

(17,033.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 448.

MARCUS A. SPURR, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

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Transcript of Record.

U. S. Circuit Court of Appeals, Sixth Circuit.

MARCUS A. SPURR }
 vs. }
 UNITED STATES. }

Stipulation.

There being much of the transcript in this case which is not material to be considered in determining the questions presented by the present writ of error, and much of the assignment of errors being a verbatim duplication of matter contained in the bill of exceptions—for the purpose of limiting the printed record practically to the questions now involved and saving expense in printing, it is agreed:

I.

That the following parts of the transcript may be omitted entirely from the printed record :

1. Minute entries showing return and amendment of indictments, and the indictments themselves and all indorsements thereon.
2. All subsequent minute entries prior to that of the verdict of the jury upon the last trial, and all entries of designations of judges in the transcript.
3. The specification of grounds of motion for new trial.

II.

That the following portions of the assignment of errors, being verbatim duplications from the bill of exceptions, may be omitted in the printing of the assignment of errors—the pages containing the duplicated portions of the bill of exceptions when printed being referred to instead.

(NOTE BY THE CLERK.—The twelfth assignment of error is seen by reading from the words, "In the opening statement" on page 54 to the words, "statements respecting its affairs" on page 62, and concluding with the paragraph beginning with the words, "It was error to admit the testimony" at end of eleventh assignment on page 19, printed record. The seventeenth assignment is seen by reading from the words, "with respect to the two" on page 65 to the words, "with Latham, Alexander & Co." on page 77, and ending with the paragraph beginning with the words, "It was error to admit the testimony" at end of sixteenth assignment on page 21, printed record.)

1. The entire 12th assignment of error, except the final paragraph on page 68 of the transcript, beginning with the words, "It was error to admit the testimony of these transactions"—the omitted matter being contained in the bill of exceptions on pages 114 to 122 of the transcript filed.

2. The entire 17th assignment of error, except the final paragraph on page 82 of the transcript, beginning with the words, "It was error to admit the testimony relating to these two accounts"—the omitted matter being contained in the bill of exceptions on pages 125 to 138 of the transcript filed.

III.

That the remaining portions of the transcript may be printed in the following order:

1. This stipulation.
2. Petition for writ of error.
3. Writ of error.
4. Citation and service.
5. Entry of verdict, and all subsequent minute entries except designations of judge; also appearance bond.
6. Assignment of errors, as indicated above.
7. Bill of exceptions, entire.
8. Certificate.

IV.

It is understood, of course, that this stipulation does not affect the integrity of the whole record as filed, and unprinted portions thereof may be used in argument and copied into briefs of counsel, when desired, as if the whole were printed, and if so used or referred to shall be printed in briefs of counsel.

This 1st day of June, 1897.

PITTS & MEEKS,
Att'ys for Pl'ff in Error.
ED. BAXTER,

Special Ass't to U. S. Dist. Att'y, Middle Dist. of Tenn.

Blanks to be filled before this is filed.

Blanks filled June 4, 1897.

PITTS & MEEKS.

ED. BAXTER,

By W. G. H.

No. 502. Marcus A. Spurr, pl'ff in error, *vs.* United States, def't in error. Stipulation. Filed June 5, 1897. Frank O. Loveland, clerk.

3 Circuit Court of the United States, Middle District of
 Tennessee.

UNITED STATES }
 vs.
MARCUS A. SPURR. }

The above-named defendant, Marcus A. Spurr, conceiving himself aggrieved by the verdict and judgment in this cause, doth pray a writ of error from the said judgment rendered on the 12th day of December, 1896, and that his said writ of error be allowed; defend-

ant also prays that a transcript of the record and proceedings upon which said judgment is based, duly authenticated, together with his assignment of errors herewith filed may be sent to the circuit court of appeals for the sixth circuit of the United States, to the end that said judgment may be reversed.

MARCUS A. SPURR, *Defendant.*

PITTS & MEEKS,
Attorneys for Defendant.

The foregoing petition is allowed.
Feb. 18, 1897.

H. F. SEVERENS,
U. S. Dist. Judge.

Filed Feb'y 18, 1897.

H. M. DOAK, *Clerk.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, } ss:
Sixth Judicial Circuit,

The President of the United States to the honorable the judge of the circuit court of the United States for the middle district of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States, plaintiff, and Marcus A. Spurr, defendant, a manifest error hath happened, to the great damage of the said defendant, Marcus A. Spurr, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the sixth circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the* 18th day of March next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

H. M. DOAK,
Clerk of the Circuit Court of the United States.

Allowed by—
H. F. SEVERENS,
U. S. District Judge.

* Not exceeding 30 days from the day of signing the citation.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, }
Sixth Judicial Circuit, } ss.:

To The United States, Greeting :

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the* 18th day of March next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the middle district of Tennessee, wherein Marcus A. Spurr is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of February, in the year of our
 5 Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America, the one hundred and twenty-first.

H. F. SEVERENS,
U. S. Dist. Judge.

* Not exceeding 30 days from the day of signing.

Service of the within citation acknowledged.

TULLY BROWN,
U. S. Dist. Att'y.

M'ch 9, '97.

On Friday, April 17th, 1896, the following order was entered :

" UNITED STATES }
 vs. } 7994, Consolidated.
 MARCUS A. SPURR. }

Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment and recommend him to the mercy of the court.

And thereupon came the defendant, by counsel, and also in proper person, and defendant having been granted by the court time to present his exceptions to the charge of the court and to the action of the court on defendant's special instructions, until the jury should return their verdict, said exceptions were immediately filed upon return of the verdict.

And thereupon, upon motion of defendant, he is allowed forty days' time from this date in which to enter a motion for a new trial, and reasonable time after said motion is disposed of, in case the same should be overruled, to prepare and file his bill of exceptions; and in the meantime it is ordered that defendant stand upon his

present bond to await the judgment and sentence of the court, and this case is continued until the next term of the court."

At a circuit court of the United States, begun and held at the Federal court-room in the city of Nashville, on the third Monday of April, A. D. 1895, present and presiding the Hon. Horace H. Lurton, circuit judge, and Henry F. Severens, sitting by designation, etc.

On May 23rd, 1896, came the defendant and filed his motions in arrest of judgment and for a new trial, which were as follows:

"UNITED STATES
vs.
M. A. SPURR. } Motion in Arrest of Judgment.

And now, on this the 23rd day of May, 1896, comes the defendant in proper person, and by his counsel, and moves the court to arrest judgment herein.

First. For insufficiency of the indictment; and

Second. Because the verdict is uncertain and insufficient to warrant a judgment.

PITTS & MEEKS,
Att'ys for Defendant."

"UNITED STATES
vs.
M. A. SPURR. } Motion for New Trial.

And now, on this the 23rd day of May, 1896, comes the defendant in proper person and by his counsel, and without waiving his motion in arrest of judgment, but relying on the same, and in the event the said motion shall be overruled, moves the court for a new trial on the following grounds:

"UNITED STATES
vs.
MARCUS A. SPURR. } 7994, Consolidated.

Came The United States, by Tully Brown, district attorney, and the defendant, as well in proper person as by his attorneys, Pitts & Meeks, when defendant's motion in arrest of judgment and for a new trial, heretofore entered in this cause, was submitted upon argument of counsel, and was taken under advisement by the court. It was ordered by the court that counsel for defendant submit their brief to the district attorney within twenty days from this date;

that the district attorney, within five days after the receipt of defendant's brief, submit his reply to defendant's counsel, and that defendant's counsel, within five days after the receipt of said reply, submit their rejoinder to the district attorney. It is further ordered by the court that the defendant stand upon his present bond to await the further action of the court in this case.

It is further ordered by the court, by and with the consent of counsel, that the time within which defendant may prepare bill of

exceptions is hereby extended a reasonable time after the motion in arrest of judgment and for a new trial shall have been disposed of, to be prescribed by the court upon the disposal of said motions.

At a circuit court of the United States, begun and held at the Federal court room in the city of Nashville, on the third Monday of October, 1896, present and presiding, the Hon. Henry F. Severens, judge, etc.

On Saturday, Dec. 12th, 1896, and during said term, the following order was entered :

| | | |
|------------------|---|---------------------|
| UNITED STATES | } | 7994. Consolidated. |
| vs. | | |
| MARCUS A. SPURR. | | |

Indictments Nos. 7994, 8078, and 8139 for false certification of checks.

Came the United States, by Tully Brown, and the defendant, M. A. Spurr, in proper person, and by Pitts & Meeks, his attorneys, and the motion of the defendant for an arrest of judgment and for a new trial heretofore made and argued, and the court upon due consideration thereof, orders and adjudges that each of said motions be overruled and disallowed.

And thereupon, the United States, by its district attorney, moved the court for sentence upon the verdict of the jury heretofore rendered, upon counts Nos. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, count No. 1 and 4 of indictment No. 7994, count No. 3 of indictment No. 8139, count No. 2 of indictment 8078 and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said ; and the court, being
8 cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3rd, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date.

And upon motion of defendant, by his attorneys, accompanied by a statement that the defendant contemplates suing out a writ of error operating as a supersedeas, it is ordered and adjudged by the court that the execution of the foregoing sentence be suspended until January, 1897, and that the defendant execute a bond before the clerk of this court with sufficient sureties in the penalty of ten thousand dollars, payable as required by law, and conditioned that the said Marcus A. Spurr shall appear on the 13th day of January, A. D.

1897, and deliver himself up to the marshal for said district to undergo said sentence; or shall, meantime, have sued out and obtained said writ of error to the Supreme Court of the United States, and shall appear upon the third Monday of April, 1897, and from time to time thereafter, until said writ of error shall have been disposed of, and deliver himself up to said marshal, to undergo said sentence, or in case said writ of error shall be disposed of in his favor, he shall appear from time to time in this court until the cases then left pending against him shall be disposed of.

It is further ordered that until said bond be executed before the clerk of this court, the defendant be in the custody of the United States marshal for this district.

It is further ordered and adjudged by the court, upon motion of counsel for defendant, that sentence upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, count No. 2 of indictment No. 8078 and count No. 5 of indictment No. 8139 be deferred until the first day of the next regular term of this court.

It is further ordered and adjudged by the court that upon a writ of error being sued out by the defendant and granted, the same shall operate as a supersedeas, until the determination of such writ of error, without further order.

It is further ordered that the defendant have until the 13th day of January next to make up and file bill of exceptions and assignments of error and make his application for a writ of error.

Present and presiding, Hons. H. H. Lurton, Henry F. Severens and Chas. D. Clark, judges.

On Saturday, January 9th, 1897, the following order was made:

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|------------------|-----------------------|
| " UNITED STATES | } 7994. Consolidated. |
| vs. | |
| MARCUS A. SPURR. | |

In this case it being made to appear satisfactorily to the court that it has not been and will not be practicable to prepare and settle a bill of exceptions within the time limited by the previous order of the court in this behalf, it is now, on motion of Messrs. Pitts & Meeks, counsel for defendant,

Ordered that the time for settling bill of exceptions be, and the same is hereby, extended until the expiration of the fifteenth day of February next."

Present and presiding, the Hons. H. F. Severens and C. D. Clark, judges.

Monday, February 15th, 1897, the following order was entered:

| | |
|------------------|-----------------------|
| " UNITED STATES | } 7994. Consolidated. |
| vs. | |
| MARCUS A. SPURR. | |

The time heretofore limited for the settlement of the bill of ex-

ceptions in this cause is hereby extended until the 25th day of February, inst.

Let the foregoing order be entered of record.

February 15th, 1897.

H. F. SEVERENS,
U. S. Judge, under Designation."

10 Present and presiding, the Hons. Horace H. Lurton and Chas. D. Clark, judges, etc.

On Friday, March 5th, 1897, the following order was entered :

" UNITED STATES }
vs. } 7994. Consolidated.
MARCUS A. SPURR. }

In this cause, upon application of the attorneys for the defendant, it is ordered by the court that the time heretofore limited for the filing of the record in this cause be extended until April 1st, 1897."

On Wednesday, March 10th, 1897, the following order was entered :

" UNITED STATES }
vs. } No. 7994. Consolidated.
MARCUS A. SPURR. }

On motion, this day, before Hon. H. H. Lurton, judge of the United States, by the district attorney, for an order requiring defendant to find bail for his personal appearance herein upon final judgment on the writ of error sued out by him in this cause, it appears to the court that in the order and judgment herein of Dec. 12, 1896, it was recited that it was suggested that defendant purposed suing out a writ of error from the Supreme Court of the United States to reverse said judgment after settlement of the bill of exceptions, and was provided that in the event such writ of error was obtained the same should operate as a supersedeas, and bond was directed to be given by defendant in the sum of ten thousand dollars conditioned for his appearance in this court upon final judgment on said writ of error in case a writ of error should be sued out by him, which bond the defendant accordingly gave, and the same was duly approved. It further appears to the court that after said judgment and order of December 12, 1896, and before the bill of exceptions was settled and filed, and before any writ of error herein was applied for and obtained by the defendant, jurisdiction thereof was by act of Congress conferred upon the United

11 States circuit court of appeals for the sixth circuit; and that since the passage of said act of Congress, the defendant has filed his bill of exceptions, duly signed by the Hon. H. F. Severens, U. S. district judge trying the cause, and has also sued out a writ of error from the said United States circuit court of appeals for the sixth circuit, to reverse the judgment aforesaid, which was by the said H. F. Severens, judge, duly allowed, and that citation thereon

has been issued and service thereof acknowledged by the United States district attorney for the middle district of Tennessee.

And the court being of opinion that it is proper to require the defendant to find new bail, in accordance with the motion of the district attorney.

It is ordered that the defendant find bail in the sum of ten thousand dollars, with sureties to be approved by the court or by H. M. Doak, clerk, conditioned that he will be and appear in the circuit court of the United States for the middle district of Tennessee, on and after the filing in said court of the mandate of the said United States circuit court of appeals, and from time to time as he may be required, to answer any further proceedings and abide by and perform any judgment which may be had or rendered therein in this case, and that he will abide by and perform any judgment which may be rendered or affirmed against him in the said circuit court of appeals; and, upon the execution and approval of such bond as above prescribed, the said defendant shall be discharged from further custody under the judgment and proceedings heretofore had in the case, pending the hearing of the said writ of error, or until the further order of the court.

And thereupon came defendant and his sureties, and execute bond in accordance with this order, and the same is approved by the court.

HORACE H. LURTON,
Circuit Judge, &c."

The said bond is as follows :

UNITED STATES OF AMERICA, }
Middle District of Tennessee, } ss :

We, Marcus A. Spurr and Alex. Perry, Guilford Dudley and J. H. McPhoil, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of ten thousand dollars, lawful money of the United States of America, to be levied of our and each of our goods and chattels, lands and tenements, upon this condition :

Whereas the said Marcus A. Spurr has sued out a writ of error from the judgment of the circuit court of the United States for the middle district of Tennessee in cause No. 7994, consolidated, of said court, being *The United States vs. Marcus A. Spurr*, for a review of said judgment in the United States circuit court of appeals for the sixth circuit :

Now, if the said Marcus A. Spurr shall be and appear in the circuit court of the United States for the middle district of Tennessee on and after the filing in said court of the mandate of the said circuit court of appeals, and from time to time thereafter as he may be required, to answer any further proceedings and abide by and perform any judgment which may be had or rendered therein in this case, and shall abide by and perform any judgment which may be rendered or affirmed against him in the said circuit court of appeals,

and not depart said court without leave thereof, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 10th day of March, 1897.

MARCUS A. SPURR.

ALEXANDER PERRY.

GUILFORD DUDLEY.

J. H. McPHOIL.

— — —
— — —

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Taken and approved this 10th day of March, 1897, before me—

HORACE H. LURTON,

Circuit Judge.

Circuit Court of the United States for the Middle District of Tennessee.

UNITED STATES }
vs. }

MARCUS A. SPURR. }

Assignment of Errors. Filed Feb'y 18, 1897. H. M. Doak, Clerk.

And now comes the defendant, Marcus A. Spurr, by his attorneys, Pitts & Meeks, and says that in the record and proceedings in the above-entitled cause there is manifest error in the following particulars, that is to say:

13

I.

In the following paragraph of the charge of the court to the jury:

"It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact acquire information of the truth."

II.

In the modification of defendant's 3d request for special instructions by the addition of the words inclosed in brackets at the end thereof, the said special instruction as so modified and given being as follows:

"If you believe from the proof that at the organization of this bank the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge in such matters, and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the

bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts together with the by-laws relating to those two officers in connection with the other proof in the case bearing on the question whether the defendant had knowledge of the state of accounts of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know the state of that account at the time he certified said checks. (But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.)"

III.

In the refusal by the court of defendant's 4th request for special instructions, which was as follows:

14 "If you believe from the proof that the management of the details and accounts of the banks was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazy, and that it was not at any time referred to or placed in the hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that the account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."

IV.

In the refusal by the court of defendant's 6th request for special instructions, which was as follows:

"It is incumbent on the Government to prove to your satisfaction beyond a reasonable doubt, that at the time defendant certified the checks mentioned in the indictment he actually knew that Dobbins & Dazy did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact, and that he neglected it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was careless or negligent or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it; but it must appear by the proof, beyond a reasonable doubt, that he did actually know, at the time he certified the checks, that sufficient funds were not on deposit to meet

the checks, and that he certified them willfully and with such knowledge."

V.

In the modification of defendant's 2nd request for special instructions by the addition of the words inclosed in brackets at the end thereof, said special instruction, as so modified and given, being as follows:

2. "Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties." "(But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.)"

VI.

In the following language of the charge of the court to the jury:

"The Government is bound, in order to maintain any of the counts in these indictments, to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on."

16

VII.

In the modification of defendant's 5th request for special instructions by the interlineation of the words inclosed in brackets, namely: "Besides the overdraft then existing," which special instruction, as so modified, was as follows:

"If you find from the proof that the account of Dobbins & Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty, and you should acquit him, unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions."

VIII.

In the refusal of the defendant's 7th request for special instructions, which was as follows:

"If you find from the proof that the defendant believed and understood, at the time the account of Dobbins & Dazy was taken, and during its existence at the Commercial national bank, that they were engaged in the purchase of cotton and its shipment to New York and other eastern points; that they had numerous branch offices and agents in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds, the parent house expected to deposit, and that they were depositing to their credit in the Commercial national bank, drafts on their correspondents in New York, secured by bills of lading for cotton, and then drawing their checks on the Commercial national bank against such deposits; and that their deposits were expected to consist, and did consist mainly of such New York drafts. If you believe from the proof that the

17 defendant understood and believed that this course of business was to be, and was in fact being, pursued by Dobbins & Dazy at Nashville, and that the volume of such business would be large, and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the indictment that Dobbins & Dazy, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of kiting as developed by the proof on this trial, and that having no knowledge of the overdraft of Dobbins & Dazy's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed they were making such daily deposits of New York exchange

and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

IX.

In the following portion of the charge of the court, being the latter portion of defendant's 7th request for special instructions, modified by the court by the addition of the words inclosed in brackets, and being, as so modified and given, as follows:

"(If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, (I add, in addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him."

X.

In the refusal of defendant's 9th request for special instructions in connection with the 8th, which was given, which 9th request was as follows:

9. "The defendant's want of knowledge of the state of the account of Dobbins & Dazy at the time he certified the checks, will be a complete defense to him unless you are satisfied beyond a reasonable doubt that such want of knowledge proceeded from a will to disobey the law, or from an indifference to its command."

XI.

In the action of the court in responding to a question of the jury on their return into court after being charged, in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of Congress of 1882, on which the indictment is based, in response to the jury's question and in the further instructions of the court in that connection, which were not called for by the jury—which question, action of the court thereon and further instructions, were as follows:

"The jury came into court and asked the following question, which was written out in pencil and handed to the court: 'We want the law as to the certification of checks when no money appeared to the credit of the drawer.'

The COURT: The jury state they want the law as to the certification of a check when there is no money to the credit of the drawer.

I cannot better answer this question, which the jury has put to the court, than by reading the section of the Revised Statutes, which relates to that subject:

'It shall be unlawful for any officer, clerk or agent of any national banking association, to certify any check drawn upon the association unless the person or company drawing the check has on de-

posit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.'

The COURT: Does this answer your question?

FOREMAN OF THE JURY:

A. Yes, sir.

The COURT: I read it again, so that you may all understand it.

(Court reads that part of sec. 5208, R. S. as quoted.)

The COURT: Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazy—the overdrafts—were in excess of the amount which Dobbins & Dazy had as a limit or line of credit.

I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it."

It was error to admit the testimony relating to these transactions of 1886 and 1887, over the said objection of defendant. Said objection should have been sustained, and such testimony rejected.

XIII.

In the following language of the charge of the court, on the subject of the transactions mentioned in the 12th assignment of error:

"The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own, or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank, especially if he had reason to suppose that firm was engaged in such speculations."

XIV.

In the refusal of defendant's 13th request for special instructions, on same subject which was as follows:

20 "Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business and that the Commercial national bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge of, or reason to suspect, the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities as other customers were required to do."

XV.

In the modification of defendant's 10th request for special instructions, by striking therefrom the word "truth," and inserting instead thereof the words in brackets, namely; "right conduct as respects the affairs of the bank," which said instruction, so modified, and showing the word stricken out in italics and the substituted words in brackets, was as follows:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth (right conduct as respects the affairs of the bank), the defendant would have the right to rely upon his statements in regard to that account."

XVI.

In the modification of defendant's 11th request for special instructions on same subject, by striking therefrom the words, "was despoiling the bank and using its funds," and inserting instead
21 thereof the words in brackets, namely; "had been using the funds and credits of the bank;" and by also striking therefrom the word, "dishonestly," and inserting instead thereof the words in brackets, namely; "unlawfully in respect to its affairs"—said

special instruction as so modified and showing the words stricken out in italics and those substituted in brackets, was as follows:

"The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that defendant knew the fact, would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was despoiling the bank and using its funds (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and acting dishonestly (unlawfully in respect to its affairs)."

It was error to admit the testimony relating to these two accounts over said objection of defendant. Said objection should have been sustained, and such testimony rejected.

XVIII.

In the refusal of defendant's 14th request for special instructions in reference to personal dealings in stocks by Porterfield and Spurr, which was as follows:

14. "The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks through Latham, Alexander & Co., in their joint personal names and with their own means, is not evidence of the dishonesty of either; nor is the fact that they bought in the same way, similar stocks in the name of Porterfield individually, through Herzfeld & Co.; and if you believe that these accounts were mere personal transactions, not involving the bank in any way so far as the defendant was concerned, and he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he cannot be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

XIX.

In the exclusion of the evidence of John Overton and other witnesses, offered by defendant, first, as to defendant's good character for truth and veracity; and secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville—offered and excluded under the following circumstances:

After defendant had testified, and been cross-examined by plaintiff's counsel in the manner set forth in the record, defendant's counsel insisted that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely (and counsel for plaintiff, subsequently, in argument before the jury, did argue and insist that defendant had not testified truthfully, and that his testimony was unreasonable and not worthy of belief); and offered testimony as

to his good character for truth and veracity, whereupon, during the examination of Mr. John Overton, and after said witness had answered preliminary questions touching his age and residence and to the effect that he had known defendant about thirty years, the following proceedings were had, to wit:

"Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER: The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS: If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity during the entire period that he has lived in Nashville up to the time of this investigation and subsequent thereto.

The COURT: The question now is, not your right to put the defendant's character in issue, but as to the time in which you can prove his general character. I have no doubt but he has the right to put his general character in issue, but the question now inquired into is as to the time of the limitations within which it can be done. The rule which allows the defendant to offer proof of his character, is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not, but

I think the time to which the testimony should relate in
23 regard to his good character should also have reference to that time. Now there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present and as to whether the defendant's reputation stood untarnished since this transaction or since his arrest. Now, I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaintance, his familiarity with the defendant and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions, then ask him what that character was, if the preceding question have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case, that is, the respondent's character for truth and veracity, I am not satisfied that you have a right to go into that question generally unless his character has been attacked by the evidence on that subject.

Mr. PITTS: I would like to submit to your honor some authorities and be permitted to say something on that branch of the case.

The COURT: Very well, I will reserve that question if you think you can convince the court of the error of his ruling, but I will overrule in respect to the first one in regard to the defendant's character, that you are limited to the time when these transactions occurred.

Mr. PITTS: I think it is proper to state to your honor what I expect to prove by these witnesses.

The COURT: I understand what you expect to prove and I overrule that proposition.

Exception taken for the defendant.

Q. Now, Col. Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time, as the court has limited me, to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity?

24 Objected to.

The question as to the admissibility of this evidence was argued by counsel, and the court stated that the evidence would only be permitted as to the character of the witness up to the time of the failure of the bank, and that after an examination of the question, the court would announce tomorrow whether or not the other part of the evidence offered would be admitted."

Other witnesses were then examined under the same ruling and limitation—counsel stating to the court that he wished to ask all of them as to the character of defendant for truth and veracity during their entire acquaintance with him down to the present time, also that he wished to ask them as to his character for honesty and integrity during the same period; and that he expected to prove by all the witnesses that his character was good in both respects.

The court upon statement of the district attorney that the Government admitted defendant's good character for honesty and integrity down to the period of the charge of the indictment, limited defendant to ten witnesses as to character; and that number was examined under the above ruling and limitation, embracing farmers, merchants, physicians, mechanics, and State and county officials.

On the morning succeeding the argument of the question, the court announced its adherence to the ruling above stated, grounding the same upon the fact that the plaintiff had introduced no evidence of defendant's bad character, and held, without deciding whether defendant had been impeached by cross-examination, that not having been impeached by evidence that his character was bad, he could offer no evidence of his good character as to truth and veracity.

The court in the charge to the jury, on the subject of defendant's testimony, said:

"Nevertheless, he (referring to defendant) testified that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this true? It is for you to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."

It was error to exclude the evidence offered as to the
25 good character of defendant for truth and veracity; and it was also error to limit the evidence of defendant's good character for honesty and integrity to the time of this charge against him, upon the objection, not of the defendant, but of the plaintiff.

XX.

In the action of the court in overruling defendant's motion for arrest of judgment for uncertainty and insufficiency of the verdict of the jury.

PITTS & MEEKS, *Attorneys.*

UNITED STATES, Plaintiff, }
vs.
M. A. SPURR, Defendant. }

Bill of Exceptions. Filed Feb'y 18, 1897. H. M. Doak, Clerk.

Be it remembered that upon the trial of this cause before Hon. H. F. Severens, beginning on March 30th, and ending with the verdict of the jury, on April 17, 1896, the following proceedings were had:

It was proven and not denied that the Commercial national bank was organized in 1884; that defendant M. A. Spurr was president and F. Porterfield, cashier, from its organization to its failure on March 25, 1893; that the original capital stock was \$200,000, which was increased from time to time to \$500,000; that its board of directors consisted of 21 members; that it had two standing committees, one known as the executive committee which was created and its duties prescribed by by-law No. 17, and the other known as the examining committee which was created and its duties prescribed by by-law No. 28; that the only by-laws of the bank relating to the duties and responsibilities of the president and cashier were by-laws No. 8 and 9. These several by-laws were read in evidence, together with No. 19, relating to the payment of checks, and are as follows:

"No. 8. The cashier of this bank shall be responsible for all of the moneys, funds and valuables of the bank and shall give bond with security to be approved by the board in the penal sum of \$20,000, conditioned for the faithful and honest discharge of his

26 duties as such cashier, and that he will faithfully apply and account for all such moneys, funds and valuables, and deliver the same to the order of the board of directors of this bank or to the person or persons authorized to receive them."

"No. 9. The president of this bank shall be responsible for all such sums of money and property of every kind as may be intrusted to his care or placed in his hands by the board of directors or by the cashier or otherwise come into his hands as president and shall give bond with security to be approved by the board in the penal sum of \$5,000 conditioned for the faithful discharge of his duties as such president, and that he will faithfully and honestly apply and account for all sums of money and other property of this bank that may come into his hands as such president, and pay over and deliver the same to the order of the board of directors, or to any other person or persons authorized by the board to receive the same."

"No. 17. There shall be a committee to be known as the executive committee consisting of the president, five directors and the vice-president, who shall have the power to discount and purchase bills, notes and other evidences of debt and to buy and sell bills of exchange, and who shall at each regular meeting of the board of directors make a report of all bills, notes and other evidences of debt purchased by them for the bank since their last previous report."

"No. 19. No officer or clerk of this bank shall pay any check drawn upon it, or pay out money on any order unless the drawer of such check or order shall, at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order."

"No. 28. There shall be appointed by the board of directors a committee of three members thereof, whose duties it shall be to examine, four times a year, or oftener, the affairs of this bank, to count its cash, compare the assets with the accounts of the general ledger, to ascertain whether these accounts and all others are correctly kept and whether the condition of the bank corresponds therewith, and whether the bank is in sound and solvent condition, and recommend to the board such changes in the manner of doing business, etc., as shall seem to be desirable, the result of which examination shall be reported to the board at the next regular meeting thereafter."

The plaintiff introduced evidence tending to establish the charges in the several counts of the consolidated indictments based on the following-described checks of Dobbins & Dazy, on the Commercial national bank, viz:

- 27 1 dated Dec. 9, 1892, for \$15,000.00.
1 dated Dec. 17, 1892, for 31,000.00.
1 dated Jan'y 3, 1892, for 40,000.00.
1 dated Feb. 13, 1892, for 9,641.95.

No evidence was offered in support of the accounts based upon the check of Feb'y 27, 1893, for \$40,000, the court on a former trial having directed a verdict of not guilty as to that check, as admitted by counsel for both parties.

Plaintiff introduced (as collateral) evidence, tending to show that defendant certified two checks drawn by Dobbins & Dazy on said Commercial national bank, both dated Jan'y 24, 1893, one for \$3,000 and the other for \$11,724.89.

But the defendant was not indicted for the certification of either of said checks.

It was not denied by defendant that he marked "good" the above-mentioned checks and signed his name thereto as president, in the form stated in the indictments; but he denied that he did so with knowledge that Dobbins & Dazy did not at the time have sufficient moneys or funds on deposit in the bank to meet the checks.

Evidence was given that during the entire period covered by the dates of the above-mentioned six checks, the account of Dobbins & Dazy in the said bank was continuously and largely overdrawn upon the individual ledger, with the exception of one day in Jan'y, 1893, when there was a small credit balance; that the overdrafts or debit balances of each day were shown upon the individual ledger in red ink, and credit balances in black ink; that these overdrafts in the Dobbins & Dazy account varied largely in amount, running from \$4,495.90 to \$122,593.29, the account being a very active one; that on the several days upon which the above-mentioned checks were certified or marked good by the defendant the account of Dobbins & Dazy was overdrawn in the Commercial national bank on the individual ledger, and that they, the drawers of the checks, had no funds or moneys on deposit in the bank with which to meet the checks.

The state of the account of Dobbins & Dazy on the days of the said several certifications by defendant, and on preceding and succeeding days, as appeared by the individual ledger of the bank, were shown to be as follows:

| | |
|--|--------------|
| Overdrawn at close of business, Dec. 8, 1892..... | \$114,194 01 |
| Deposited Dec. 9, 1892..... | 50,153 30 |
| 28 Checked out same day..... | 377 26 |
| Overdrawn at close of business, same day..... | 64,417 97 |
| Deposited Dec. 10, 1892..... | 13,972 00 |
| Checked out same day..... | 42,407 48 |
| Overdrawn at close of business, same day..... | 92,853 45 |
| Overdrawn at close of business, Dec. 16, 1892..... | 19,503 74 |
| Deposited nothing, Dec. 17, 1892..... | |
| Checked out same day..... | 31,568 91 |
| Overdrawn at close of business, same day..... | 51,072 65 |
| Overdrawn at close of business, Jan. 2, 1893..... | 77,515 59 |
| Deposited Jan. 3, 1893..... | 79,941 25 |
| Checked out same day..... | 40,551 50 |
| Overdrawn at close of business, same day..... | 38,125 84 |
| Overdrawn at close of business, Jan. 23, 1893..... | 62,153 37 |
| Deposited Jan. 24, 1893..... | 889 47 |
| Checked out same day..... | 22,982 50 |
| Overdrawn at close of business, same day.... | 84,256 46 |
| Deposited Jan. 25, 1893..... | |

| | |
|---|------------|
| Checked out, same day.... | 38,336 89 |
| Overdrawn at close of business, same day... | 122,593 29 |

Both of the checks dated Jan'y 24th, 1893, certified by defendant, were stamped paid, Jan'y 25th, 1893.

| | |
|--|-----------|
| Overdrawn at close of business, Feb. 11, 1893..... | 49,454 69 |
| (Feb'y 12th was holiday.) | |

| | |
|--|-----------|
| Deposited Feb'y 13, 1893..... | 4,589 78 |
| Checked out same day. | 23,378 82 |
| Overdrawn at close of business, same day... .. | 68,243 73 |
| Deposited Feb. 14, 1893..... | 34,965 00 |
| Checked out same day..... | 39,641 95 |
| Overdrawn at close of business, same day. | 72,920 68 |

And that the check of Feb'y 13, 1893, certified by defendant, was paid on Feb'y 14, 1893, and there was evidence tending to show that it was certified by defendant on the latter date.

The items in detail, making up the above aggregates of deposits and checks on the days stated, were not shown.

There was evidence for the plaintiff tending to show, directly, that all the employes of the bank below the cashier had knowledge of the condition of the Dobbins & Dazy account, and of the fact that it was continuously and largely overdrawn during the period covered by the dates of the checks certified by defendant; but the same testimony, on cross-examination, tended to show that none of these employes communicated this fact to the defendant or to any of the directors or committees of the bank or to the bank examiners.

The evidence chiefly relied on by the plaintiff to show knowledge of defendant of the state of the Dobbins & Dazy account at the dates of his certifications, was circumstantial—there being no direct testimony to that fact, except the testimony of F. Porterfield, to the effect that during the period between Nov. 25, 1892, and the failure of the bank he communicated the fact to defendant that the account of Dobbins & Dazy was continuously and largely overdrawn.

There was evidence for the plaintiff tending to show that defendant had access to the books of the bank, and was frequently among the clerks and book-keepers in the front part of the banking-house, where the books were kept, making inquiries concerning various matters and accounts from time to time—defendant's desk being in the director's room in the rear end of the banking-house; but on cross-examination the same testimony tended to show that the directors and committees of the bank and the bank examiners also had access to the books and were sometimes among the books and book-keepers in the front part of the banking-house, and that none of these persons discovered that the account of Dobbins & Dazy was overdrawn; also that defendant did not at any time make any inquiry of the book-keepers concerning that account, and that it was never referred to him by the directors or committees, nor his attention called to it by any of the clerks, book-keepers or employes of the bank.

The plaintiff also introduced evidence tending to show, as a circumstance indicating knowledge of the state of the Dobbins & Dazy account on the part of defendant, that the defendant and F. Porterfield were each engaged in speculations in cotton futures through Dobbins & Dazy, during the period covered by the dates of the checks certified by defendant and Porterfield, without furnishing any margins, and that the funds of the Commercial national bank were used by Dobbins & Dazy in such speculations with the knowledge of defendant. The evidence on this subject was conflicting, that on the part of defendant, both by cross-examination of plaintiff's witness and by witnesses introduced by defendant, tending to show that the alleged speculations by him through Dobbins & Dazy were fictitious—that no purchases or sales of cotton futures by
30 Dobbins & Dazy for him had been authorized by him, and that none such had in fact been made by them for him; also that defendant did not know that Dobbins & Dazy were speculating in cotton futures, or that they or Porterfield were using the bank's funds in that way.

The plaintiff also offered and introduced (subject to exceptions by defendant as hereinafter fully shown) evidence tending to show, as a further circumstance indicating knowledge and intent on the part of defendant, that in 1886, and 1887 a large amount of the moneys and funds of the bank were used by Porterfield as cashier, with the knowledge of the defendant, and without the knowledge or consent of the bank, its directors or committees, to purchase on speculation stocks for the joint account of himself and defendant, and of other persons, in the name of the bank, or himself as cashier.

The plaintiff also offered and introduced (subject to exceptions by defendant as hereinafter fully shown), as further circumstances indicating knowledge and intent on the part of defendant, evidence bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., of New York city, in the name of "Frank Porterfield, separate," and the other opened October 3, 1889, with Latham, Alexander & Co., also of New York city, in the name of "Porterfield & Spurr," both of which were continued down to the close of the bank in 1893.

The evidence on the part of the plaintiff tended to show that defendant and Porterfield were jointly interested in the speculations indicated by these accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds and cotton futures were made by them for their joint benefit on these accounts; and that large sums of the moneys and funds of the bank were used by Porterfield in such purchases, with the knowledge and assent of defendant.

The evidence for plaintiff did not tend to show that the funds used originally as margins on the opening of these accounts, were the funds of the bank and not the personal funds of Porterfield and Spurr; but it did tend to show that after the accounts were opened and had been running for some time, the funds of the bank were remitted to New York upon them by Porterfield, without securing or reimbursing the bank therefor. The evidence was conflicting

upon the questions whether defendant was jointly interested with Porterfield in all the transactions shown upon these accounts, whether he had knowledge or information of all of said transactions, 31 whether he was interested in, or had knowledge of, the continuation of the Herzfeld & Co. account after Sept., 1890, and whether he knew that Porterfield was using the funds of the bank in either account—the evidence on the part of the defendant tending to show the negative of all these questions.

There was further evidence on the part of defendant, both by cross-examination of plaintiff's witnesses and by witnesses called by defendant, tending to show, and from which the jury might have found, that at the organization of the Commercial national bank defendant had had no experience in the banking business; had not before been connected in any way with any bank; knew nothing of the details of such business; was not a book-keeper, and that he has never had any experience in book-keeping; but there was also evidence tending to show that as early as 1869, he was a member of the firm Prewett, Spurr & Co., at Nashville, a large lumber manufacturing concern, which was organized into a corporation in Dec., 1870, or Jan'y, 1871, when he became its secretary and treasurer, and afterwards, in 1884, its president, at a yearly salary of \$3,000, which position he held during the entire existence of said bank, and that in 1886, in addition to being president of that corporation and of the bank, he was an active director and officer in a number of other corporations in Nashville, and that he was a very intelligent man and an exceedingly good business man; that Porterfield was experienced in the banking business; had spent most of his business life in banks; had filled every station from messenger to assistant cashier; was familiar with all the details of such business, including the keeping of books; was thoroughly competent for the position of cashier, and that down to the failure of the Commercial national bank his reputation for honesty, integrity and fidelity to the interests of the bank was of the very best, and he was trusted implicitly by the stockholders, directors and committees of the bank, and by the business public.

There was also evidence for defendant, both by cross-examination of plaintiff's witnesses and by witnesses called by defendant, tending to show, and from which the jury might have found, that at the organization of the bank, in view of the respective qualifications and experience of the president and cashier, it was understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president should 32 give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention; that this understanding and arrangement continued down to the close of the bank; that defendant's time was chiefly occupied with outside duties, such as working up custom and patronage, securing influential men for places in the directory, corresponding with country banks and securing their accounts and entertaining their officials when visiting the city, securing the busi-

ness of new corporations which were being organized, often by becoming a stockholder and director or officer in them, and in settling, collecting or securing such bad and doubtful debts as were referred to him for that purpose by the directors or committees of the bank; also that the account of Dobbins & Dazy was never at any time referred to defendant, or placed in his charge, by any of the directors or committees of the bank; also that Porterfield, cashier, selected and employed, located and promoted or changed from place to place in the bank, all employes below assistant cashier (who was elected by the directors) and had immediate charge and supervision of them and of their work; also that there were nearly two thousand separate individual accounts on the individual ledgers, and that the book-keepers were constantly at work on these ledgers during the day when not engaged on the scratch books, pass books, etc.

The court, in the general charge, instructed the jury as follows:

"It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

To which instruction the defendant then and there excepted.

Defendant requested the court to give the following special instruction, being the third of defendant's requests for special instructions:

"(3.) If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge
33 and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm, which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

The court gave it, but modified it by the following addition:

"But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual

knowledge is not necessary if the defendant purposely abstained from inquiry."

To which modification the defendant then and there excepted.

Defendant also requested the court to give the following special instruction on this subject, being the 4th of defendant's requests:

"If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazy, and that it was not at any time referred to or placed in the hands or under the charge of the defendant nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that that account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."

Which instruction the court refused, and to which refusal the defendant then and there excepted.

Defendant also requested the court to give the following special instruction on same subject, being the 6th of defendant's requests:

34 "It is incumbent on the Government to prove to your satisfaction beyond a reasonable doubt that at the time defendant certified the checks mentioned in the indictment he actually knew that Dobbins & Dazy did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact and that he neglected it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was careless or negligent or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it; but it must appear by the proof beyond a reasonable doubt, that he did actually know at the time he certified the checks that sufficient funds were not on deposit to meet the checks and that he certified them wilfully and with such knowledge."

Which instruction the court also refused, endorsing upon the same that it was "declined except as given in other instructions;" to which refusal the defendant then and there excepted.

The following are the other portions of the general charge and special instructions granted, relating to this subject:

"The Government is bound in order to maintain any of the counts in these indictments to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offence charged will be explained and its modifications stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly that the account of the drawers was overdrawn when these certifications took place, but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any
35 inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check, Good, that was sufficient."

These three paragraphs were in the general charge, and preceded the clause first above quoted from the general charge in reference to defendant's duty to know the state of the account—the entire paragraph of the general charge embracing the clause first quoted being as follows:

"The checks before their certification were not obligations of the Commercial national bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazy justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty."

And in still subsequent portions of the charge, the following:

"In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the facts, the moral prob-

abilities flowing from conceded facts, or which are proven to your satisfaction should also be considered and such probabilities may furnish ground for believing that that which they indicate is the truth."

Also the 15th special instruction, asked by defendant and granted, as follows:

"(15.) The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

And the 8th special instruction, asked by defendant and granted, with the addition by the court of the words in brackets, as follows:

"(8.) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazy did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge."

The word "wilfully" was not used in the charge of the court nor in any special instruction given, except in the portions above quoted.

But the court among other things instructed the jury as follows:

"If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find that, in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

Also:

"If you find beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing

because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

The matter last quoted is a part of defendant's 12th request for instructions, elsewhere quoted in this bill of exceptions in full.

Also:

"And in general, if the defendant acted in good faith, in making these certifications believing that the state of the account of Dobbins & Dazy justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith would not render him guilty."

The matter last quoted is a part of a paragraph of the charge, which paragraph is elsewhere herein copied in full.

Also: The 10th special instruction asked for by the defendant as follows:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account."

Also:

"The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever credit his testimony delivered here may be entitled to, the question remains with you to settle upon all the evidence, whether the defendant Spurr, in certifying these checks, acted in good faith, and without any attempt to do that which the law forbids, and which he must be presumed to know was unlawful, namely: the certifying of the check as good, when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted."

Also: The following, being a part of defendant's fifth special request, elsewhere given in full in the bill of exceptions:

"If you find from the proof that the account of Dobbins & Dazy upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified,

were sufficient, or more than sufficient to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, unless such ignorance of the overdrafts was wilful, as elsewhere explained in the court's instructions."

Defendant also requested the court to give the following special instruction, being the second of defendant's requests:

"(2.) Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties."

The court gave this instruction, but modified it by the following addition:

"But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

And to this modification the defendant then and there excepted.

There was also evidence tending to show that during and prior to the period covered by the dates of the checks certified by the defendant, Geo. A. Dazy, in the name of his firm of Dobbins & Dazy was conducting a system of what is known among banks as "kiting," between Nashville and New York, and that his method of operation was as follows:

He would draw in the name of Dobbins & Dazy, large drafts on the New York correspondents of his firm, John Monroe & Co., and Latham, Alexander & Co., bankers and brokers, and deposit and discount these drafts without any bills of lading attached and take credit for the proceeds as cash, on the accounts of Dobbins & Dazy

in the two banks of Nashville, in which they carried regular accounts, namely, the First national bank and the Commercial national bank. Dobbins & Dazy, through said Dazy, would then draw their checks on these local banks against the proceeds of such New York drafts, which checks would be paid, and the New York drafts would be forwarded in the mail by the banks which had discounted them, to New York for collection. The time required for the drafts to reach New York by mail and be presented for payment was known.

40 Dobbins & Dazy having no funds in the hands of the drawees of these drafts to meet them when drawn, in order to provide funds in New York to meet them when presented, Dazy would again, on the day it was calculated the drafts would be presented for payment, draw another set of drafts in the name of his firm on the same drawees, discount and take credit for them in the First national bank and Commercial national bank, of Nashville, as before, draw checks against such proceeds in favor of some local bank in which Dobbins & Dazy did not carry an account—generally the Fourth national bank, but sometimes the American national bank—and by means of these checks have the amount necessary to meet their maturing drafts in New York transmitted by wire to the drawees, John Monroe & Co., or Latham, Alexander & Co., as the case might be, so that the drawees might pay the first set of drafts when presented. When the second set of drafts were about to reach New York and be presented, provision for their payment would be made in the same way; that is, by means of a third set of New York drafts used as a basis for checks, upon which money would be again transmitted by wire to New York as before; and so on, the proceeds of succeeding drafts being used to take up the preceding ones and the volume of such transactions continually increasing.

When each of said drafts was drawn upon John Monroe & Co. and Latham, Alexander & Co., Dobbins & Dazy, according to their own books, were largely overdrawn with the drawees, but there was no evidence as to how their accounts stood on the books of the drawees. There was also evidence tending to show that certain officers of the First national bank were speculating in cotton through Dobbins & Dazy, during the period in which that bank was accepting the unsecured drafts of Dobbins & Dazy as cash, and was certifying Dobbins & Dazy's checks to carry out said kiting transactions.

There was also evidence on this subject tending to show that these transmissions of money to New York for Dobbins & Dazy by the Fourth national bank and the American national bank were made by means of cipher telegrams, addressed to their bank correspondents at New York, directing them to place so much money with John Monroe & Co. or Latham, Alexander & Co., as the case might be, for the credit of Dobbins & Dazy; that these cipher telegrams were understood only by the sending and receiving banks, and were meaningless to all other persons; and that the fact that such transmissions were being made, or that this system of "kiting" was

41 going on, was a secret at Nashville, and was known only to G. A. Dazy and his clerks, and to the banks making the transmissions and to F. Porterfield.

There was evidence by Porterfield tending to show that during the period from November 25th, 1892, to the failure of the Commercial national bank, Porterfield told the defendant that Dobbins & Dazy were transmitting large sums of money to New York by telegram.

The evidence further tended to show that the amount thus transmitted to New York for Dobbins & Dazy by the Fourth national bank, from Sept. 6, 1892, when such transmissions began, to March 1, 1893, when they closed, was \$1,829,427.25, on checks drawn by Dobbins & Dazy upon the Commercial national bank, and \$1,633,524.25 on checks drawn by Dobbins & Dazy on the First national bank; and that at the failure of the Commercial national bank on March 25, 1893, it had on hand drafts amounting to \$142,000, which had been drawn by Dobbins & Dazy on New York and discounted and credited to them by the Commercial national bank, on Feb'y 27, 1893, and which had been protested for non-payment on March 1, 1893, and have never been paid.

There was also read in evidence a written contract of partnership between F. Porterfield, G. A. Dazy and W. J. Wood, which was as follows:

"This contract, made and entered into by and between George A. Dazy, Frank Porterfield and William J. Wood, all of the city of Nashville, county of Davidson and State of Tennessee;

Witnesseth:

That whereas, said parties have this day formed a partnership to be known by the firm name of Dazy & Company, for the purpose of gathering information in regard to the growing crop of cotton and making such trades or deals as the result of this information as said parties may agree to; now, therefore, the premises considered, the said parties expressly promise and agree to and with each other as follows:

I.

The profits and expenses of the partnership to be shared and borne equally by each of the said parties.

II.

Said firm having employed an agent, or agents, to collect and state the facts with reference to the cotton crop of 1892-1893, it is expressly agreed that the information coming to said firm from said agent or otherwise shall not be given to any other person whomsoever, nor published until each of the members of said firm have given their assent to its communication or publication.

III.

Said parties expressly bind themselves to the utmost caution in this regard, it being well understood by each one of them that the only hope of success in this undertaking is to keep closely to themselves for the benefit of this firm only, the information they may obtain.

IV.

It is agreed that said parties shall meet as often as practicable and determine just what purchases and sales shall be made, and at these meetings a majority of the three partners shall determine upon the purchases or sales to be made.

V.

It is further agreed and stipulated that the information shall be kept in such way as to always be open to each of the three members of the firm, but to no other person, whomsoever, unless it shall be necessary to employ some person or agent to collect and tabulate the information coming to said firm.

The term of this partnership is to commence at once and to continue for three years, but it may be dissolved at any time by the wish and consent of one member of said firm.

In witness whereof, the said parties have signed this agreement in triplicate, this the fifth day of May, 1892.

GEORGE A. DAZY.

W. J. WOOD.

FRANK PORTERFIELD."

Witness:

SAM KIRKMAN.

There was evidence on the part of the plaintiff tending to show that defendant had knowledge or information of the existence of this contract some time after it was made; but there was also evidence on the part of the defendant tending to show, and from which the jury might have found, that defendant had no knowledge or information of such contract until after the failure of the Commercial national bank.

43 The evidence further tended to show that there were large speculations in cotton futures by the parties to said contract during the summer and fall of 1892; that after the failure of the Commercial national bank, F. Porterfield and Geo. A. Dazy were jointly indicted in this court for conspiracy to fraudulently abstract and misapply the moneys and funds of said bank in speculations in cotton futures; that Dazy had been tried and convicted upon said indictment, and had served out his sentence in the penitentiary; and that Porterfield had been tried and convicted upon another indictment for fraudulent abstraction and misapplication of the funds of said bank, and is now serving his sentence in the penitentiary.

There was evidence tending to show that the firm of Dobbins & Dazy made application to the executive committee of the Commercial national bank (which met each day at the bank), in September or October, 1891, to place part of its account with that bank, and to have a line of credit allowed it of \$30,000—a line of credit being the privilege of borrowing the sum specified upon its own notes without security; that the matter was under discussion by the committee for several days, and on or about October 10, 1891, the account was taken and the said line of credit allowed; that at that time, and

down to the 23rd of March, 1893, the firm of Dobbins & Dazy was reputed to be very wealthy, and to be doing a very large and prosperous business in the purchase and sale and exportation of cotton; that its financial standing and credit were of the very best; that the worth of the firm was rated in commercial circles and by the standard commercial agencies at from \$300,000 to \$500,000 (although the plaintiff's evidence tended to show that their assets consisted only of money, choses in action and cotton on hand and in transit, and that they never raised money in bank on drafts without bills of lading attached, except on the drafts used during said kiting transaction); that the character and reputation of its members, personally, for honesty, integrity and truthfulness were first class; that the parent house of the firm was at Nashville, Tennessee, and was under the immediate charge of George A. Dazy, a member of the firm; that a branch house at New Orleans was under charge of J. P. Dobbins, the other member, and the firm had numerous branch houses and purchasing agencies located at numerous cities in the cotton-producing sections of the South, where cotton was purchased in large quantities for shipment to New York and other eastern points, and for exportation to Europe.

Also that at the time Dobbins & Dazy placed their account with the Commercial national bank in October, 1891, it was understood by the executive committee and by the defendant, who was a member of that committee, that their business was one of great magnitude, in amount, and that their course of business was, to purchase cotton through their branch houses and agents at various points in the South, these branch houses and agents shipping the cotton to the correspondents of the firm in the East and drawing on the parent house at Nashville for the price of the cotton so purchased, attaching the bills of lading to the drafts so drawn; that the parent house, to meet these drafts so drawn upon it, would draw its drafts upon its correspondents in the East, the consignees of the cotton, attaching to them the same bills of lading, then deposit and discount these eastern drafts in its local banks at Nashville, and draw its checks against the proceeds, in payment of the drafts drawn upon itself by its branch houses and agents; that it was understood at the time the account was accepted by the committee that the deposits of the firm would be chiefly in eastern drafts, and not in money; and that the bank would be expected to provide cash funds with which to meet the checks drawn by the firm against the proceeds of such eastern drafts, which, it was understood, would be secured by bills of lading for cotton; that on account of this course of business and its magnitude, as understood by the committee, and the apprehension that the bank might not always be able to provide sufficient cash funds without inconvenience, to carry the account, there were objections by two members of the committee to the taking of the account, and it was these objections that occasioned the prolonged discussion of the matter in the committee; that defendant, Spurr, was one of the objecting members, and the ground of his objection was that just stated; that the other objecting member was Major R. H. Dudley, who objected on the same ground as defendant, Spurr,

and also on the ground that, having been in the cotton business himself, he believed they would be likely to overdraw their account; that when the account was finally taken, the cashier was directed by the committee, in defendant's presence, not to allow them to overdraw their account, nor to borrow more than their line of credit, and not to discount their drafts without bills of lading attached,

and he promised to comply with their direction; that the
45 cashier was thereafter several times asked by Major Dudley about the account, and he always replied, down to the close of the bank, that it was satisfactory and a very profitable account; that the members of said committee understood and believed that Porterfield was performing his promise to the committee and obeying the instructions which the committee had given him in regard to the account and drafts of Dobbins & Dazy, and that there was never any circumstance brought to the knowledge of the committee indicating that there was anything wrong with the account of Dobbins & Dazy, or suggesting the propriety of an investigation of that account; the members of both the executive and examining committees and all the directors of the bank who were examined upon the subject, testified that they did not know or have any intimation at any time before the failure of Dobbins & Dazy on March 23, 1893; that their account was overdrawn in the bank, or that they were depositing and discounting, or had deposited and discounted, any eastern drafts without bills of lading attached; and there was evidence tending to show that said committeemen and directors did not regard it as any part of their duty to examine the accounts of depositors on the ledger, nor the drafts deposited by the customers of the bank.

There was also evidence tending to show that Porterfield misrepresented the real state of the Dobbins & Dazy account to the defendant and the committees and the directors of the bank, by statements made to them, and also in his sworn reports to the Comptroller of the Currency, wherein the overdrafts in the bank were very largely understated.

There was also evidence for defendant tending to show, and from which the jury might have found, that the defendant also understood at the time the account of Dobbins & Dazy was taken by the bank and thereafter until the 9th of March, 1893, that the course of business of the firm was to be and was as above stated; that he did not receive or handle any of the New York drafts deposited by the firm, and had nothing to do with the discounting of them, nor with the keeping of their account on the books; that he did not understand that such matters were within the line of his duties, but were entrusted to the cashier and the teller and the book-keepers under him; that he had no knowledge or intimation that Dobbins & Dazy had been discounting their drafts without bills of lading attached
until the 9th of March, 1893, when he first learned through
46 Mr. Porterfield of the protest of the drafts drawn by them on John Monroe & Co. of New York for \$142,000, drawn Feb'y 27, and protested March 1, 1893; that he understood and believed, up to that time, that all eastern drafts discounted by the bank for

the firm were secured by bills of lading, as the cashier had promised the committee they should be; and that he had no knowledge or intimation of the kiting arrangement of Dobbins & Dazy through telegraphic transmissions, of money to New York by the Fourth and American National Banks of Nashville, as disclosed in this cause, until after the failure of the Commercial national bank.

There was also evidence for defendant tending to show, and from which the jury might have found, that he had no knowledge of the fact that the account of Dobbins & Dazy was overdrawn on the books of the bank at the time of the certification of any of the checks upon which he is indicted, nor at any time during the period covered by the dates of the checks; that he did learn at one time, in the early part of the account, that it had been overdrawn, but learned at the same time that the overdraft had been made good; that this information was given him by the cashier in response to an inquiry made of him soon after the account was opened as to how it was progressing.

Defendant testified that he remembered the circumstances attending the certification of the check of Dec. 17, 1892, mentioned in the indictment and that he was enabled to locate and remember these facts by the fact that he had been absent from the city, and had just returned to the bank that day, when a messenger of the Fourth national bank handed him the check; that while he held it in his hand, the cashier came in, and he asked the cashier whether the check was good, and he replied that it was good, and for much more—whereupon he marked it good, and handed it back to the messenger, understanding and believing from the cashier's statement that there were funds and credits of Dobbins & Dazy in the bank more than sufficient to cover the check. As to the other checks mentioned in the indictments, defendant testified that he remembered in a general way certifying them, but could not locate the dates or amounts, nor could he remember any of the circumstances attending their certification, but was positive that he inquired in every instance, either of the cashier or of the exchange clerk, who kept the account of New York exchange or New York

47 drafts deposited, and in every instance received information that sufficient funds and credits of Dobbins & Dazy were then in the bank to cover the check certified, and that he never did at any time certify a check without receiving such information, and that he relied upon it as true; that if the cashier was in, he inquired of him, if not, he inquired of the exchange clerk; and there was other evidence besides the testimony of defendant tending to show the defendant sometimes inquired of the exchange clerk for the amount of New York exchange or drafts deposited by Dobbins & Dazy, and that he gave the information—his desk being near that of the cashier, and in the rear portion of the building, near the directors' room, where the president's desk was.

There was also evidence tending to show, and from which the jury might have found, that on the day the evidence tended to show that each of the checks mentioned in the indictment, except that of December 17, 1892, was certified by the defendant, there was de-

posited in the bank by Dobbins & Dazy, in New York exchange or drafts, a sum more than sufficient to cover the check certified on that day, although not sufficient to cover both the check and the overdraft then existing on the books of the bank, as shown by the individual ledger on the morning of that day.

There was also evidence tending to show that there was not enough deposited on Jan'y 24, 1893, to cover the two checks of Dobbins & Dazy, dated that day, which were certified by the defendant.

There was also evidence tending to show that in the course of carrying the account of Dobbins & Dazy by the Commercial national bank it frequently became necessary for the bank to sell New York exchange to other banks of the city, in order to provide itself with necessary funds to meet the checks drawn upon it by Dobbins & Dazy, and the demands for money of its other customers; and that on this account the cashier gave instructions to the tellers and clerks to report back to him the deposits of Dobbins & Dazy as they were made, and also to send back to him the checks drawn by them on the bank, when presented, in order as his testimony tended to show that he might be constantly informed of the condition of the account and be enabled to arrange for the sale of exchange, if necessary, to meet balances due the other banks of the city at their daily settlements.

There was also evidence tending to show that there was no clearing-house at Nashville; and that the banks of the city for
48 their convenience in making settlements with each other, had adopted the following custom or plan for accomplishing such settlements:

The hour of 11 o'clock a. m. each business day was fixed as the exchange or settlement hour. At that hour each bank of the city sent to every other bank a list of items then held by the former against the latter, and received from the latter a similar list of items held by the latter against the former; and from these lists the balance was ascertained, and only this balance was required to be paid. This balance, however, was not required to be paid at 11 o'clock, the exchange hour, but might be paid at any time before the close of the banks, at 2 o'clock p. m. Items received after 11 o'clock were held over and included in the exchange and settlement of the next day. Lists of these latter items were usually exchanged by the banks at 8 o'clock a. m. of the next day, before the opening hour, which was 9 o'clock, and their footings entered into and formed part of the regular exchange and settlement at 11 o'clock; that it was not the custom of the Nashville banks, during the time to which the facts of this case relate, to present to each other for payment the separate checks as they were received during the day, but all the checks were held and embraced in bulk in the general exchanges and settlements between the banks as above set forth; but it was customary, when a large check was received by a bank, drawn upon another bank of the city to send it by a messenger before cashing it or remitting money on account of it, to the drawee bank to know whether it was good and would be recognized and paid at the next

exchange or settlement hour; and if it was good, some officer of the drawee bank would mark it good and return it by the messenger.

There was also evidence tending to show that when the Fourth national bank began to telegraph money to New York for Dobbins & Dazy in the fall of 1892, upon their checks certified by the Commercial national bank, the Fourth national bank occasionally carried the checks over to the following day; that is, that when they came in after 11 o'clock they would be carried over and paid the next day; but that later on this was changed and the Fourth national bank required that the checks be paid the same day and before the money was telegraphed to New York.

There was also evidence, undisputed, that none of the said four checks of Dobbins & Dazy marked good by defendant, were so marked by him for or at the request of Dobbins & Dazy, or any messenger or agent of that firm, but that they were all presented by a messenger of the Fourth national bank, and marked good at his instance to indicate that they would be recognized and paid at the next exchange or settlement hour.

There was also evidence on the part of the defendant tending to show, and from which the jury might have found the following custom and practice of the Commercial national bank in reference to certifying checks and marking checks "Good":

That the bank kept on the teller's desk a certification stamp containing the word "Certified" and the date, with a blank space left for the signature of the certifying officer; that a check certified for a depositor of the bank, presumably for the purpose of being sent off by mail or going into circulation, was stamped with the certification stamp by the teller, who wrote his name in the blank space, and then made out for the book-keepers a charge ticket directing a charge to the customer's account of the amount of the check, and a credit ticket directing the same amount to be credited on the account of "certified checks," on the general ledger; that when the check was afterwards returned and presented and paid by the bank, it was charged to account of "certified checks," thus balancing the account with respect to that item; that this custom was always pursued with checks certified for depositors and returned to them; and that on the other hand, where a check was presented by an associate bank of the city, simply with a view of ascertaining whether it would be recognized and paid in the next exchange and settlement between the holding and drawee banks, and with no view of going into circulation, it was simply marked "Good" or "O K" by the teller, the cashier, assistant cashier or president—to whomsoever of these officers it might be presented; and that in such case, the certification stamp was not used, no charge or credit tickets were made and no notice was taken of such check on the account of "certified checks," nor on the drawer's account, until the check came in regularly through the bank exchange and settlement.

There was testimony tending to show that where a check was presented to the teller, and he knew that the drawer had the money to his credit in the bank the custom was for the teller to certify the check without referring it back to the cashier or any one else. There

was no testimony that any of the checks certified by defendant were ever presented to the teller.

The court, in the general charge, gave the following instruction:

50 "The Government is bound, in order to maintain any of the counts in these indictments, to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on."

To which instruction the defendant then and there excepted.

The subsequent explanation and modification of the third element of the offense, referred to above, was as follows:

"The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check 'Good,' that was sufficient."

Defendant requested the court to give the following special instruction, being the 5th of defendant's requests:

51 "5. If you find from the proof that the account of Dobbins & Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty and you should acquit him."

Which instruction the court declined to give in its original form, but modified it by adding certain words, and gave it as thus modified; the added words appearing in brackets, as follows:

"5. If you find from the proof that the account of Dobbins &

Dazy upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty and you should acquit him (unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions)."

To the modification by adding the words "besides the overdraft then existing," the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the 7th of defendant's requests:

"7. If you find from the proof that the defendant believed and understood, at the time the account of Dobbins & Dazy was taken and during the existence at the Commercial national bank, that they were engaged in the purchase of cotton and its shipment to New York and other eastern points; that they had numerous branch offices and agents in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds, the parent house expected to deposit, and that they were depositing, to their credit in the Commercial national bank, drafts on their correspondents in New York secured by bills of lading for cotton, and then drawing their checks on the Commercial national bank against such deposits; and that their deposits were expected to consist and did consist, mainly of such New York drafts. If you believe from the proof that the defendant understood and believed that this course of business was to be, and was in fact being pursued by Dobbins & Dazy, at Nashville, and that the volume of such business would be large, and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the indictment that Dobbins & Dazy, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of kiting as developed by the proof on the trial, and that having no knowledge of the overdraft of Dobbins & Dazy's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

The court declined to give this instruction, endorsing thereon, "Declined. The main part of this request is a recital of part of the evidence only, and is argumentative. The latter part is correct and is given." The court gave the latter part of this instruction, after modifying it, as follows—the words added by the court being inclosed in brackets:

"(If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified (I add: in addition to the existing overdraft), he would not be guilty under the indictment and you should acquit him."

To the refusal of the 7th special instruction, and to the instruction given as a modified portion thereof, the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the defendant's 9th request:

"9. The defendant's want of knowledge of the state of the account of Dobbins & Dazy at the time he certified the checks will be a complete defense to him unless you are satisfied beyond a reasonable doubt that such want of knowledge proceeded from a will to disobey the law, or from an indifference to its commands."

The court refused this instruction, endorsing on it, "Declined as liable to mislead as to the character of the purpose," and to which refusal the defendant then and there excepted.

53 After the jury were charged and had retired from the court-room to consider their verdict, and had been deliberating for some hours, they returned to the court-room and asked the following question, which was written out in pencil and handed to the court:

"We want the law as to the certification of checks when no money appeared to the credit of the drawer.

The court then said: The jury state that they want the law as to the certification of a check where there is no money to the credit of the drawer.

I cannot better answer this question which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject.

(Reads from sec. 5208, R. S.): It shall be unlawful for any officer, clerk or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

Does this answer your question?

FOREMAN OF THE JURY: Yes, sir.

The COURT: I read it again so that you may all understand it. (The court reads again that part of section 5208 R. S. quoted above, and added:)

Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the

case, were in excess of that. The account of Dobbins & Dazy—the overdrafts—were in excess of the amount which Dobbins & Dazy had as a limit of line of credit.

I charge you in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there is no funds there to meet it.

You understand what I have said now is to be taken in connection with what I have before instructed you."

As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that.

To this action of the court in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time beginning with the words "The \$30,000" and ending with the words "to meet it," the defendant then and there excepted.

In the opening statement of counsel for the Government to the jury as to the facts and what the Government expected to prove as evidence that defendant Spurr certified the checks of Dobbins & Dazy wilfully or with bad intent to injure the bank, he stated as follows:

"13th. As further evidence that Spurr certified the checks of Dobbins & Dazy, wilfully or with bad intent to injure said bank, the Government expects to prove that in December, 1886, De Neufville & Co. were stock brokers in New York, and that Porterfield sent them \$25,000 of the moneys of the Commercial national bank to be used by them as margins for buying certain stocks on speculation for Porterfield, Spurr and others.

Afterwards the account was transferred from De Neufville & Co. to Latham, Alexander & Co., who were bankers and brokers in New York.

On May the 14th, 1887, certain of said speculative stocks was sold by Latham, Alexander & Co., at a loss of \$9,762.35; one-third of which (\$3,254.12) was admitted by the defendant to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note of May 12, 1887, for the amount; which note has been renewed from time to time, and the last re-

newal note which is for \$5,500 is now in the hands of the bank's receiver, and the principal thereof is wholly unpaid.

Another third of said loss (\$3,254.12) was admitted by Porterfield to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note of May 21, 1887, for \$5,796.39 to cover his share of said loss and also
55 another loss sustained by him on other speculations made through Latham, Alexander & Co."

And thereafter on the trial, and before the Government rested, and as part of its case-in-chief, and during the direct examination of Mr. Chas. Fraser, of the firm of Latham, Alexander & Co., of New York, counsel for the Government offered proof of certain purchases and sales of stocks on the New York stock exchange, through De Neufville & Co., and Latham, Alexander & Co., all of New York, in the name of F. Porterfield, cashier (of the Commercial national bank) for the account of sundry customers of said bank, including F. Porterfield, R. S. Cowan, who was at the time assistant cashier, and the defendant, in 1886 and 1887. There had been proof, before this offer of evidence of specific transactions, tending to show that the Commercial national bank had been, since soon after its organization, acting as agent for its customers in making purchases and sales of stocks and bonds on New York exchange, charging commission for its services, and requiring customers for whom such purchases and sales were made to fully protect it by depositing sufficient cash or collateral securities or making notes; that this was known to and approved by the directors, and that the income from commissions on such purchases and sales was large and greatly swelled the general profits of the bank.

Defendant's counsel objected to the evidence offered of specific transactions of stocks and bonds, and to all evidence which might be offered of that character. The grounds of objection urged in argument were:

First. Its irrelevancy to the charges of the indictment.

Second. The remoteness in time of such transactions from the transactions involved in the charges of the indictment.

Third. The want of any connection between such transactions and those involved in the charges of the indictment.

Fourth. That such transactions were not shown to be fraudulent; nor if so, that defendant had any knowledge of the fraud; and that they were neither similar nor contemporaneous transactions to the charges of the indictment, and their admission would tend to multiply the issues, and to confuse the jury and prejudice the defendant.

The jury retired from the court-room and the question of the admissibility of this line and character of evidence was argued
56 before the court; whereupon the jury having returned, the court announced its ruling upon the objection as follows:

By the COURT: "I will then announce the conclusion reached by the court upon the question whether the proof proposed would be admissible for the purpose of affecting the question of intent by proving similar contemporaneous or near transactions. I greatly doubt

whether it would be admissible, on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose. I do not think it is expedient to go any more extensively into the grounds of the ruling; the jury being present, I purposely abstain from any discussion of the facts. It seems only to remain to say that the ruling of the court must necessarily be based upon the offer to prove it as a whole and the court must assume that the proposition is made in good faith and it is only upon that assumption that such proof can be made, and cannot be controverted. I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact, whether he did rely upon any assumed correctness, or honesty of action."

To which ruling the defendant then and there excepted, and it was agreed and understood that all subsequent testimony relating to collateral transactions of purchases and sales of stocks, &c., should be treated as subject to the same objection and exception without repeating same at each offer.

Thereupon, Mr. Chas. Fraser being recalled, he and other witnesses, subject to said objection and exception, testified on this subject, their testimony tending to show by memoranda, charge and credit tickets, deposit slips, pencil statements and calculations, all in the handwriting of F. Porterfield, and by accounts and statements from the books of New York bankers and brokers, the following purchases and sales of stocks for the Commercial national bank made with the funds of said bank remitted to New York by said Porterfield, for account of defendant and the other persons named, with the result stated, namely :

November 12, 1886, 200 shares Hocking Valley stock, sold through Kohn, Popper & Co. Net profit \$424.46 credited on books of the bank one-half to F. Porterfield and one-half to M. A. Spurr. Commissions of \$50 retained by the bank and credited to "exchange account."

57 November 26, 1886, 100 American cotton oil certificates, sold through Kohn, Popper & Co. Net profit \$980.58 credited one-half to F. Porterfield and one-half to M. A. Spurr. Commissions \$25 and interest \$7.98 retained by the bank.

November 26, 1886, 100 shares Louisville & Nashville R. R. stock, sold through Kohn, Popper & Co. Net profit \$290.92 credited one-half to F. Porterfield and one-half to M. A. Spurr. Commission \$25 and interest \$8.52 retained by the bank.

December 16, 1886, 200 shares Tenn., Coal I. R. R., stock sold through De Neufville & Co. (Net profit \$2,933.18 credited one-half to R. S. Cowan, one-fourth to F. Porterfield and one-half to M. A. Spurr, sic.) Commissions \$50 and interest \$66.82 retained by the bank.

January 15, 1887, 1,200 shares (\$25 each) Nashville & Chattanooga R. R. stock and 300 shares Tenn., Coal I. R. R. stock, sold through Latham, Alexander & Co. Net loss, \$9,762.35 charged one-third

against F. Porterfield, one-third against R. S. Cowan and one-third against M. A. Spurr. Commissions \$150 and interest \$583.76 to May, 1887, retained by the bank.

Prior to November 12, 1886, the following sums of money were sent to Kohn, Popper & Co., by Porterfield as cashier to be credited to the Commercial national bank; and to be used as margins on certain stock transactions which he was conducting as cashier with Kohn, Popper & Co., for the customers of the bank, viz: Feb'y 18, 1886, \$500 and \$750; March 29, 1886, \$500; April 10, 1886, \$1,500; May 6, 1886, \$500; May 11, 1886, \$500; May 14, 1886, \$2,425.44; June 12, 1886, \$605.10; June 17, 1886, \$1,000; July 8, 1886, \$1,000; August 31, 1886, \$2,000; October 6, 1886, \$2,000; October 27, 1886, \$1,000.

That for the one-third of the loss, \$9,762.35 just stated, namely, \$3,254.12, chargeable to defendant M. A. Spurr, he gave his demand note to the bank on May 20, 1887, secured by 149 shares, \$7,450, of Lebanon & Nashville Turnpike stock attached and pledged in face of the note, which note was approved by the executive committee of the bank; that defendant paid the interest quarterly on this note until Dec. 10, 1889, when he took up same with proceeds of a demand note of that date for \$4,000, secured by five \$1,000 first-mortgage bonds of the Sheffield & Birmingham Coal, Iron & R. R. Co. and the same 149 shares of Lebanon & Nashville Turnpike stock which had been pledged on previous note, and this note for \$4,000 was also approved by the executive committee of the bank; that on this \$4,000 note defendant paid the interest quarterly until
 58 March 16, 1893, when he took up the same with the proceeds of a demand note of that date for \$5,500, secured by 150 shares, \$7,500 par value, of Lebanon & Nashville Turnpike stock, \$5,200 of first-mortgage bonds of Sheffield & Birmingham Coal Iron & R. R. Co., and subscription receipts and certificates of Sheffield & Birmingham Coal, Iron & R. R. Co., for \$495 and \$1,050, which note was also approved by the executive committee of the bank; that the defendant did not at any time inform the executive committee or directors of the bank that these notes or any part of them were given to cover losses on stocks. There was no proof tending to show that these notes of defendant or any one of them were not good and solvent, or that the last one is not now good and solvent.

That R. S. Cowan, who was at the time of these transactions assistant cashier of the bank, paid his part of said loss to the bank by his check for the same. No proof was offered as to how Porterfield paid his part of said loss, nor as to whether he had in fact paid it or not.

That all the memoranda, tickets and slips showing these purchases and sales, and the profits and losses, including the deposit tickets on which profits were credited to Cowan and Spurr were wholly in the handwriting of F. Porterfield.

The profits credited to the defendant from said sales of stock were credited to him on the books of said bank at the times of said sales; and afterwards they were credited on his pass book and drawn out by him.

That an account for the purchase of stocks in New York was car-

ried by Porterfield, cashier, with De Neufville & Co., and Kohn, Popper & Co.; that on November 26, 1886, \$5,000 of the funds of the Commercial national bank were remitted by Porterfield, cashier, to De Neufville & Co., to margin the purchase of 300 shares of Tenn. Coal stock; and on November 27, 1886, the bank was charged by De Neufville & Co. on their books with \$30,037.50 as the price of 300 shares of Tenn. Coal stock purchased; that on December 3, 1886, said bank was charged by De Neufville & Co., with \$19,625 as the price of 800 shares of N. C. & St. L. R'y stock purchased; that on December 10, 1886, said bank was charged by De Neufville & Co., with \$31,500 as the price of 1,200 shares of N. C. & St. L. R'y stock purchase; that on December 15, 1886, \$10,000 of the bank's money was remitted by Porterfield to De Neufville & Co., through Latham, Alexander & Co.; that on December 15, 1886, \$5,000 of the bank's money was remitted by Porterfield to De Neufville & Co. through Herzfeld & Co.; that on December 18, 1886, Porterfield, 59 cashier, sent two telegrams to Latham, Alexander & Co., as follows:

" NASHVILLE, TENN., Dec. 18, 1886.

Latham, Alexander & Co.:

Would like for you to take up De Neufville & Co. account as you proposed. Will remit in full whenever you ask it. We send \$5,000 by this mail.

F. PORTERFIELD, *Cashier.*"

" NASHVILLE, TENN., Dec. 18, 1886.

Latham, Alexander & Co.:

We have with De Neufville & Co. 2,000 Chattanooga and 100 Tennessee Coal. Margin \$30,000. Would like for you to take up the account and will remit whatever additional you may require. Sent you 5,000 yesterday.

F. PORTERFIELD, *Cashier.*"

That on the same day F. Porterfield wrote to Latham, Alexander & Co. as follows:

" DEC. 18, 1886.

Latham, Alexander & Company, New York city.

GENTLEMEN: We enclose herewith, for our credit, check on the National Bank of the Republic for five thousand dollars. We take the liberty today of asking you to take up our account with De Neufville & Company, because we much prefer having it with you, it having been placed there unexpectedly to us by our friend, Mr. Duncan. A few of our customers were caught with that amount of high-priced coal and Chattanooga. They have protected us fully here, and we will pay up the balance in full whenever you call on us to do so. With remittances yesterday and today we do not think you will have to pay much; we wish the Tennessee Coal stock kept in line to secure the bond option.

Yours respectfully,

F. PORTERFIELD, *Cashier.*"

That \$5,000 of the funds of the bank were remitted by Porterfield as stated in these communications; that on December 20, 1886, Latham, Alexander & Co. paid to De Neuville & Co. for said bank \$32,037.04, charged the same to it, and the stocks then held by De Neuville & Co. for account of F. Porterfield, cashier, were thereupon

transferred and delivered by them to Latham, Alexander & Co. and the account thereafter continued with them by

Porterfield, cashier, down to the failure of the Commercial national bank; that the 1,200 shares of N., C. & St. L. R'y stock purchased by De Neuville & Co. December 10, 1886, were sold by Latham, Alexander & Co. at following dates—Jan. 13, 1887, 500 shares; Jan. 14, 1887, 400 shares; Jan. 15, 1887, 300 shares, the aggregate proceeds being \$25,375; that on Jan'y 14, 1887, the Commercial national bank was charged by Latham, Alexander & Co. with \$15,337.50, as the price of 300 shares of Tenn. Coal & Iron stock purchased.

No account of Kohn, Popper & Co. was put in evidence, but the purchases and sales stated as having been made through them, were shown by memoranda in the handwriting of Porterfield.

Numerous other similar purchases and sales for other customers of the bank were shown, and while defendant's counsel was cross-examining one of the plaintiff's witnesses in reference to stock purchases and sales for other customers of the bank, for the purpose of showing that they were of the same character as those made for the defendant, the question of the scope and purpose of this character of testimony was further discussed, in the presence of the jury, as follows:

The COURT: "The view of the court as to the particular transactions or matters that have just been referred to is this: The question here involved cannot be affected by what was done by the bank with other customers. Those transactions must stand or fall upon their own merits and this particular transaction cannot be affected by what the bank may have done with other parties.

Mr. PITTS: I don't know as I made myself clear, if your honor please, as to the purpose of the evidence. It was simply to show the character of the transactions and to show that they were of the same character as those proven by the Government, and belong in the same category, and so as to show it was in the ordinary course of business of the bank. That was all.

The COURT: If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done. I do not mean to characterize or express any opinion about any particular transaction, but it seems to me the whole inquiry in reference to this very question is upon a collateral substance, and to

refer again to what I have already said, if those transactions were of an illegal character, it would not help the present situation.

Mr. PITTS: I understand that the Government offered this proof for the purpose of showing or attempting to show that Mr. Porterfield was robbing the bank, and that Major Spurr knew it. Now I

think if these transactions may not have been authorized by the law; if Mr. Porterfield was requiring these parties to put up the money or to protect the bank, and if the bank was making money out of the transactions, although they may have been unlawful, it would not be robbing the bank.

The COURT: I have not expressed any opinion, and perhaps will not be required to in this case, as to whether it was competent for the bank to carry on such business or not, but what I say is this—that if these transactions that you are now attempting to show that Mr. Porterfield was carrying, and if he did carry them on, and Mr. Spurr knew it, I would say that their effect is neither enhanced nor impaired by the circumstance, if it should be shown, that the bank was engaged in a like kind of business with respect to other customers. That is what I mean to say, and that is the basis upon which I have excluded this evidence upon these collateral matters.

Mr. PITTS: I do not understand your honor has excluded the testimony.

The COURT: No, sir; I was simply showing my reasons for refusing to go into the details of these transactions. The evidence that is now in will stand."

There was no proof of any loss by the bank on account of these transactions of 1886 and 1887, nor of any dishonesty of Porterfield in respect to them, further than might be implied from the fact that such transactions were not authorized by the national banking law.

There was proof tending to show that all the national banks of the city of Nashville conducted a like business for their customers, and that it was customary with national banks in various parts of the country to purchase and sell stocks for their customers, and to carry accounts with the New York brokers for that purpose, similar to the accounts proven in this case.

There was no evidence tending to show that defendant knew such business to be unlawful, further than that at first it was not considered by the directors as exactly the right thing to do, but that as all the other banks were doing it, and were receiving the profits, the Commercial national bank commenced doing it for its customers.

There was no evidence tending to show that Dobbins & 62 Dazy, or either of them, had any interest in, or connection with, these accounts and transactions of 1886 and 1887 or that they had any connection with the bank until October, 1891.

In reference to the transactions set forth with Kohn, Popper & Co., De Neufville & Co. and Latham, Alexander & Co., for the joint account of defendant, F. Porterfield and R. S. Cowan, there was evidence tending to show, and from which the jury might have found, that neither defendant nor said Cowan ever saw any of the accounts, statements, charge and credit tickets, deposit slips and memoranda introduced in evidence, until they were produced in these trials; that neither defendant nor said Cowan ever gave Porterfield any order or direction to purchase any stocks jointly with each other, or with Porterfield; and that neither defendant nor said Cowan knew that the other, or that Porterfield, was interested in,

or joint purchaser of, any of said stocks; but there was evidence tending to show that defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses, that were shown upon the accounts, statements, tickets, slips and memoranda, made out by Porterfield in reference to said transactions.

There was also evidence tending to show, and from which the jury might have found, that the defendant did not at any time knowingly purchase any stocks, or securities jointly with Porterfield in the name of the bank, or of Porterfield, cashier; that he did not at any time have knowledge that Porterfield was speculating in the name of the bank, or using its funds in speculations, either for himself or others, without the bank being first amply secured by the deposit of funds or collaterals; and that he believed that Porterfield was honest, truthful and faithful to the bank, and was fully protecting its interests in all matters under his control as cashier, and that he and all of the officers and directors of the bank relied implicitly upon Porterfield's statements respecting its affairs.

Defendant testified that before purchasing any of said stocks in 1886, he pledged with Porterfield, cashier, to secure the bank, ample securities for that purpose, endorsed in blank and delivered to him, which were placed in an envelope and deposited in the bank, according to its custom, with collateral securities, where they remain until the purchases were all made and closed out by sale; that the securities so pledged by him and their value were: \$2,600 of Pre-wett, Spurr & Co., stock of the value of \$3,640; \$5,000 of Alabama

63 National Bank stock, of the value of \$5,500; \$8,000 of Lebanon & Nashville Turnpike Co. stock, of the value of \$4,000 to \$4,800; \$7,500 of Sheffield Land Co. stock, of the value of \$15,000—total value, \$28,140 to \$28,940; and that it was a part of these same securities that were pledged as collateral security for his demand note of \$3,254.12, before mentioned.

The court in the general charge, instructed the jury as follows: "The using by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank,

especially if he had reason to suppose that firm was engaged in such speculations."

To which instruction the defendant then and there excepted.

Defendant requested the court to give the following special instruction, being the 13th of defendant's requests:

"13. Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business and that the Commercial national bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were

64 received and disbursed among the stockholders, and the defendant had no knowledge of, or reason to suspect, the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account if he secured the bank amply with his own securities as other customers were required to do."

Which instruction the court refused, and to which refusal the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being the defendant's 10th request:

"10. If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and truth, the defendant would have the right to rely upon his statements in regard to that account."

The court refused this instruction in this form but modified it by interlining the words, "and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account;" also by striking out the word "truth" near the close, and inserting instead the words "right conduct as respects the affairs of the bank" and gave it as thus modified. The said instruction, as given was as follows—the words stricken out being shown in italics and the words added, in brackets:

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith, believing those statements and representations to be true (and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account),

his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and *truth* (right conduct as respects the affairs of the bank), the defendant would have the right to rely upon his statements in regard to that account."

65 To the modification by striking out the word "truth" and inserting in lieu thereof the words, "right conduct as respects the affairs of the bank," the defendant then and there excepted.

Defendant also requested the court to give the following special instruction, being defendant's 11th request:

"11. The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was despoiling the bank, and using its funds instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that *he* cashier was unfaithful to the bank and was acting dishonestly."

The court refused to give this instruction in this form, but modified it by striking out the words, "was despoiling the bank and using its funds," and inserting instead the *also by striking out the word, "dishonestly," and insert- words, "had been using the funds or credits of the bank;"* also by striking out the word, "dishonestly," and inserting instead the words, "unlawfully in respect to its affairs," and gave it as thus modified—the instruction as given being as follows, the words stricken out appearing in italics, and those inserted, in brackets:

"The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier was *despoiling the bank and using its funds* (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and was acting *dishonestly* (unlawfully in respect to its affairs)."

To this modification of the instruction by the court the defendant then and there excepted.

With respect to the two other accounts before mentioned, viz: of Herzfeld & Co., with "Frank Porterfield, separate" and of Latham, Alexander & Co., with "Porterfield & Spurr," counsel for the plaintiff in his opening statement to the jury, said:

66 "14th. As further evidence that Spurr certified the checks of Dobbins & Dazy wilfully or with bad intent to injure the bank, the Government expects to prove that defendant Spurr and said Porterfield, during the period from November 10, 1890, to February 15, 1893, (which covers the period during which defend-

ant certified said checks), were engaged in other joint speculations, for the purpose of purchasing and selling cotton futures, railroad stocks and other stocks; and to use in said speculations the moneys of said bank as margins, without the knowledge and consent of its directors. That they employed a firm in New York, known as Latham, Alexander & Co., through whom to make their purchases and sales of said cotton and stock.

That defendant Spurr and said Porterfield sent to Latham, Alexander & Co., as margins, on account of said speculations, moneys of said bank, in the following sums on the following dates :

| | |
|------------------------|--------------------|
| November 10, 1890..... | \$1,500 00 |
| December 6, 1892..... | 4,000 00 |
| February 4, 1893..... | 1,000 00 |
| February 10, 1893..... | 1,000 00 |
| February 11, 1893..... | 1,500 00 |
| February 15, 1893..... | 1,500 00 |
| Total..... | <u>\$10,500 00</u> |

That all of said moneys were the moneys of said bank, and were wholly lost to said bank in speculations.

That said Porterfield as cashier, would draw drafts of the Commercial National Bank of Nashville, upon its New York correspondent, the National Bank of the Republic, in favor of said Latham, Alexander & Co., and direct said joint speculation account of Spurr and Porterfield to be credited with a portion of the proceeds of each of said drafts.

Among the drafts so drawn, were the following, viz. :

| Date. | Amount. |
|------------------------|--------------------|
| November 10, 1890..... | \$11,500 00 |
| December 6, 1892..... | 6,500 00 |
| February 4, 1893..... | 3,000 00 |
| February 10, 1893..... | 3,000 00 |
| February 11, 1893..... | 5,500 00 |
| February 15, 1893..... | 5,500 00 |
| Total..... | <u>\$35,000 00</u> |

67 Out of the proceeds of said drafts, said sums, aggregating \$10,500 were credited and appropriated to said joint speculative account, by said Spurr and Porterfield, and were wholly lost to the bank.

15th. As further evidence that Spurr certified the checks of Dobbins & Dazy wilfully, or with bad intent, the Government expects to prove that defendant Spurr and said Porterfield, during the period from March 12, 1889, to March 28, 1893, were engaged in other joint speculations for the purpose of purchasing and selling railroad and other stocks; and that they used in said speculations, as margins, the moneys of said bank, without the knowledge or consent of its directors. That they employed a broker in New York, known as

Herzfeld & Co., through whom to make the purchases and sales of said stocks.

That defendant Spurr and said Porterfield, sent to Herzfeld & Co., as margins, on account of said speculations, out of the moneys of said bank, the following, among other sums, viz:

| | |
|----------------------|------------|
| August 14, 1890..... | \$2,000 00 |
| October 3, 1890..... | 2,000 00 |

That all of said moneys were the moneys of said bank and were wholly lost to said bank in said speculations."

And thereafter on the trial, and before the plaintiff had rested, and as part of its case-in-chief, evidence was offered by the plaintiff and admitted over the objection and subject to the exception of defendant heretofore stated, with reference to collateral matters, tending to show:

As to the account of "Frank Porterfield, *saparate*," with Herzfeld & Co., that it was opened by F. Porterfield, in person, while on a visit to New York in March, 1889; that Porterfield remained in New York, after opening the account on March 12, until on or about the 25th of that month—purchases and sales being made under his personal direction while there, resulting in a profit of about \$400, and that on the 23rd of March, 1889, he received a check on said account for \$400; that a draft on Nashville was drawn for \$1,500, as margin on this account, which was paid and credited on the account March 21, 1889. The proof did not show on whom or what bank this draft was drawn; but there was no proof that it was paid out of the funds of the Commercial national bank.

The evidence on the part of the plaintiff tended to show that the account was opened originally by Porterfield for the joint benefit of himself and defendant Spurr, and by previous arrangement and understanding with Spurr, and F. Porterfield so testified; also that the \$400 received by Porterfield while in New York was subsequently divided between him and defendant, and that the draft for \$1,500, given as margins, was paid by defendant.

Porterfield testified that defendant did not withdraw from the account; that defendant well knew all the time that the purchases were continued; that the account was kept in force, and that they were jointly interested, and there was no suggestion of any withdrawal between them at any time.

The evidence on the part of the defendant, on the contrary, tended to show that defendant had no knowledge of said account nor interest in it, until on or about the 24th day of May, 1889, when Porterfield proposed to him the purchase on joint account of some stocks in New York, stating that he had a little personal account with Herzfeld & Co., and would carry the stock they might purchase on that account; also that he had put up a margin of \$1,500 and had a small amount of stock on hand, and that if defendant would make a joint demand note with him in the Bank of Commerce of Nashville, for an amount sufficient to reimburse him in the margin and interest on it, defendant might have a half interest in the stocks on

hand and such further purchases as they might agree to make; that the \$400 received by Porterfield on that account in March, was not divided with defendant, and that defendant did not pay nor have any knowledge of the said draft for \$1,500.

Defendant's evidence further tended to show that pursuant to this suggestion of Porterfield, a joint demand note of himself and defendant Spurr, written by Porterfield, for \$1,526.65 was made and discounted in the Bank of Commerce of Nashville on May 24th, 1889, the proceeds of which were received by Porterfield.

Subject to said objection and exception, there was further evidence, not controverted by the defendant, tending to show that thereafter and prior to May 6, 1890, the following stocks were purchased and sold on this account for the joint benefit of Porterfield and Spurr, namely:

- 100 Tex. Pac., bought June 7, 1889, sold Oct. 29, 1889.
- 100 Un. Pac., bought Oct. 9, 1889, sold Oct. 14, 1889.
- 100 Un. Pac., bought Oct. 22, 1889, sold Oct. 24, 1889.
- 100 N. P. Pfd., bought Oct. 25, 1889, sold Nov. 11, 1889.
- 100 St. Paul, bought Nov. 20, 1889, sold Jan. 29, 1890.
- 100 St. Paul, bought Dec. 9, 1889, sold Ap'l 28, 1890.

100 Un. Pac., bought M'ch 20, 1890, sold Ap'l 28, 1890.

69 And that 200 shares of Union Pacific, on hand May 24, 1889, were also sold—all resulting in a net profit of \$1,290.52, over and above the margin of \$1,500; and that on May 6, 1890, a check was received by Porterfield from Herzfeld & Co. for this profit, \$1,290.52, one-half the proceeds of which he placed to his own credit, and the other half to the credit of defendant Spurr, on their respective individual accounts in the Commercial national bank.

Subject to said objection and exception, there was further evidence, not controverted by the defendant, tending to show, that after May 6, 1890, the following stocks were purchased and sold on this account with his knowledge and for the benefit of himself and Porterfield, namely:

- 100 N. P. Co., bought June 4, 1890, sold June 5, 1890.
- 100 Mo. Pac., bought June 4, 1890, sold June 6, 1890.
- 100 Mo. Pac., bought June 6, 1890, sold June 6, 1890.
- 100 L. & N., bought June 10, 1890, sold June 13, 1890.
- 100 Chic. Gas, bought June 11, 1890, sold June 12, 1890.
- 100 L. & N., bought June 16, 1890, sold Aug. 18, 1890.

Also that the following additional stocks were purchased on this account, in June, 1890, and were on hand in August of that year, namely:

- 100 Atchison, bought June 9th.
- 100 Rich. Term., bought June 11th.
- 100 N. West., bought June 11th.
- 100 Atchison, bought June 12th.
- 100 C., C., C. and St. L., bought June 19th.

Also that from the opening of said account in March, 1889, to August 18, 1890, there were purchased on it, from time to time, as

appeared by said account, 3,500 shares of stock of various kinds, including those just mentioned.

There was also evidence tending to show that in the summer of 1890, stocks began to decline, and that on August 11, 1890, Herzfeld & Co. called for an additional margin of \$2,000 on this account to protect them in holding the stocks on hand; that on August 15, 1890, F. Porterfield and defendant Spurr made their joint demand note for \$2,000 to the Commercial national bank, which was approved by the executive committee of the bank, but without knowledge that it was given for margins, and with which Porterfield purchased of the bank New York exchange for that amount

70 and remitted the same to Herzfeld & Co., and it was credited on the account with "Frank Porterfield, separate," on August 18, 1890.

Defendant Spurr, after the foregoing had been admitted, testified that on returning to the city about the 15th of September, 1890, from an absence of about two weeks, and stocks continuing to decline, he stated to Porterfield that he was unwilling to risk any more money on these stocks, and requested him to close them out when the margins were exhausted; that he agreed to do so, and afterwards reported that he had done so. He also testified that he had no interest in the account after that time; that he had no knowledge of, and was not consulted about, any further purchases on it—did not know Porterfield was continuing it; received no part of any subsequent payments that were made, and had no knowledge of any remittances to Herzfeld & Co. on it out of the funds of the bank or otherwise, and supposed the account was closed; that on February 18, 1891, he paid his half of the note of \$1,526.65, to the Bank of Commerce, as shown by the books of that bank, and on same day went security for Porterfield on a renewal note for his half—Porterfield stating that it was not then convenient for him to pay it.

The account of Herzfeld & Co. with "Frank Porterfield, separate," showed the following payments and charges to Porterfield after September, 1890, viz:

| | |
|--|------------|
| Aug. 29, 1891, check | \$100 00 |
| Sept. 18, 1891, check | 1,000 00 |
| Jan. 28, 1892, check | 300 00 |
| M'ch 9, 1892, mgu. on cotton | 1,500 00 |
| Ap'l 13, 1892, check | 25 00 |
| Ap'l 14, 1892, check | 75 00 |
| Ap'l 29, 1892, check | 2,103 40 |
| Total | \$5,103 40 |

And it was shown that the items of \$1,000, Sept. 18, 1891; \$300 Jan'y 28, 1892, and \$2,103.40 Ap'l 29, 1892, were all credited by Porterfield upon his individual account in the Commercial national bank; that the item of \$1,500, margin on cotton, March 9, 1892, was charged to him as a margin on cotton futures, in which it was admitted Spurr, the defendant, was not interested; and the two

items of \$25 and \$75 of Ap'l 13th and 14th, 1892, Porterfield admitted were collected by him in person, in New York. It was also shown that in March, 1893, a few days before the Commercial national bank closed, Porterfield drew his personal check on Herzfeld & Co. in favor of the Commercial national bank, for \$5,000, and deposited the same to the credit of his personal account in the bank, but the check was returned unpaid for want of sufficient credits with the drawees.

The said Herzfeld & Co. account also showed the following purchases of stocks by Porterfield and on his orders after Sept. 15, 1890, on which large losses were sustained, viz:

- 100 shares Atchison, September 29, 1890.
- 100 shares Atchison, October 20, 1890.
- 100 shares C. C. & St. L., May 19, 1891.
- 100 shares Tenn. C. & I., June 5, 1891.
- 100 shares Ches. & Ohio, September 1, 1891.
- 100 shares West. Union, September 8, 1891.
- 100 shares Tenn. C. & I., October 2, 1891.
- 100 shares Mo. Pac., October 13, 1891.
- 100 shares Tenn. C. & I., October 14, 1891.
- 100 shares Mo. Pac., October 30, 1891.
- 100 shares L. & N., November 9, 1891.
- 100 shares Un. Pac., December 1, 1891.
- 100 shares Mo. Pac., December 2, 1891.
- 100 shares N. P. p'd, January 15, 1892.
- 100 shares Un. Pac., January 21, 1892.
- 100 shares N. Y. & N. E., January 21, 1892.
- 100 shares N. Y. & N. E., January 25, 1892.
- 200 shares Reading, January 26, 1892.
- 100 shares L. & N., January 29, 1892.
- 100 shares Rock Island, February 1, 1892.
- 100 shares Wab. p'd, February 3, 1892.
- 200 shares Reading, February 3, 1892.
- 100 shares N. Y. & N. E., February 4, 1892.
- 100 shares L. & N., February 4, 1892.
- 100 shares Tenn. C. & I., February 5, 1892.
- 100 shares Un. Pac., February 9, 1892.
- 100 shares Un. Pac., February 11, 1892.
- 100 shares Atchison, February 17, 1892.
- 100 shares Wab. p'd, February 18, 1892.
- 100 shares N. P. p'd, February 18, 1892.
- 100 shares L. & N., February 23, 1892.
- 100 shares Rich. Term., March 4, 1892.
- 100 shares N. P. p'd, March 28, 1892.
- 100 shares Un. Pac., March 29, 1892.
- 100 shares St. Paul, April 11, 1892.
- 100 shares Tenn. C. & I., April 25, 1892.
- 100 shares L. & N., June 20, 1892.

100 shares L. & N., June 27, 1892.

100 shares Rock Island, July 14, 1892.

100 shares Un. Pac., August 12, 1892.

100 shares Rock Island, September 1, 1892.
 100 shares L. & N., September 30, 1892.
 100 shares St. Paul, November 4, 1892.
 100 shares Un. Pac., November 4, 1892.
 100 shares Rock Island, November 28, 1892.
 100 shares St. Paul, January 31, 1893.
 100 shares Wab. p'd, February 9, 1893.

Said Herzfeld & Co. account also showed the following charges and credits for margins, profits and losses on cotton futures, in which it was admitted defendant was not interested, namely :

Charges.

| | |
|---|------------|
| M'ch 9, 1892, to margin on cotton contract..... | \$1,500 00 |
| Ap'l 29, 1892, to check (profit on cotton)..... | 2,103 40 |
| Nov. 9, 1892, to loss, 400 b. c. January..... | 971 90 |
| Nov. 9, 1892, to loss, 400 b. c. February..... | 1,026 30 |
| Nov. 9, 1892, to loss, 400 b. c. March..... | 1,041 35 |

Credits.

| | |
|--|------------|
| M'ch 21, 1892, by cotton margin returned..... | \$1,500 00 |
| Ap'l 25, 1892, by transfer cotton ac. (profits)..... | 2,103 40 |
| Sept. 26, 1892, by profit 600 b. c. | 647 40 |
| Nov. 16, 1892, by profit 500 b. c. January..... | 1,239 85 |

Said account also showed the following sums of money remitted by Porterfield to Herzfeld & Co., on this account after Sept. 1890, which Porterfield admitted were from the funds and credits of the Commercial national bank, viz :

| | |
|-------------------------|--------------------|
| October 10, 1890..... | \$2,000 00 |
| October 18, 1890..... | 1,000 00 |
| November 10, 1890. | 2,000 00 |
| November 12, 1890..... | 1,000 00 |
| November 24, 1890..... | 3,000 00 |
| July 30, 1891..... | 1,000 00 |
| May 23, 1892..... | 1,000 00 |
| June 10, 1892..... | 2,000 00 |
| October 29, 1892..... | 1,152 30 |
| February 27, 1893..... | 1,500 00 |
| March 2, 1893..... | 2,000 00 |
| Total..... | <u>\$17,652 30</u> |

73 Porterfield testified that defendant knew he was sending margins there to protect the account, and that the money Porterfield was sending there to margin the account was the money of the Commercial national bank.

As to the account of Porterfield & Spurr with Latham, Alexander & Co., the tendency of the evidence was the same as that in rela-

tion to the account of "Frank Porterfield, separate," with Herzfeld & Co.

It was opened early in October, 1889. The sum of \$2,000 was remitted by Porterfield to Latham, Alexander & Co., as margin, Spurr furnishing one-half of this sum and Porterfield the other half, out of their own means. All correspondence with Latham, Alexander & Co., in reference to the account was conducted by Porterfield.

This account showed purchases and sales of stocks, running as follows:

| | | | | |
|-------------------------|--------|------------------------|------|----------|
| Oct. 3, '89. 100 shares | } sold | Oct. 30, '89. Profit.. | | \$437.50 |
| Oct. 4, '89. 100 shares | | | | |
| Nov. 4, '89. 200 " | " | Nov. 8, '89. " | .. | 237.50 |
| Nov. 12, '89. 200 " | " | Nov. 20, '89. " | .. | 3,150.00 |
| Nov. 21, '89. 100 " | } | Dec. 2, '89. Loss.... | | \$200. |
| Nov. 29, '89. 100 " | | | | |
| Dec. 2, '89. 100 " | " | Dec. 11, '89. Profit.. | | 125.00 |
| Dec. 2, '89. 200 " | " | Ap'l 29, '90. " | .. | 600.00 |
| Jan. 30, '90. 100 " | " | M'ch 19, '90. Loss.... | | 650. |
| Jan. 31, '90. 100 " | " | Aug. 27, '90. " | | 187.50 |
| M'ch 19, '90. 100 " | " | M'ch 29, '90. Profit.. | | 350.00 |
| June 9, '90. 100 " | " | Aug. 27, '90. Loss.... | | 212.50 |
| Aug. 19, '90. 100 " | " | Sep. 8, '90. " | | 187.50 |
| Sept. 26, '90. 100 " | } | Nov. 12, '90. " | | 2,775.00 |
| Sept. 29, '90. 100 " | | | | |

There was no controversy by the defendant concerning the purchase and sale of the foregoing stocks. He admitted in his testimony that he was consulted about them by Porterfield, and authorized them to be made. But the defendant testified that there were other transactions in stocks and cotton futures appearing subsequently on said account about which he was not consulted, of which he had no knowledge, and which he did not authorize.

Defendant testified that while in Florence, Ala., on the 11th of November, 1890, and noticing that stocks were weak and declining on account of financial disturbances resulting from the Baring failure, he telegraphed Porterfield to sell their Louisville & Nashville stock, being the 200 shares last appearing on the above statement and which had been purchased on Sept. 26 and 29, 1890; that these were all the stocks they then had on hand, as he understood, and that on his return home a few days thereafter, he was informed by Porterfield that the stocks had been sold.

There was also evidence in this connection tending to show, that in November, 1892, Porterfield exhibited or read to defendant a letter from Latham, Alexander & Co., advising the purchase of cotton futures, and expressing the opinion that cotton would advance; that Porterfield suggested that they should buy some cotton futures on this account with Latham, Alexander & Co.; that Spurr replied that he did not know anything about cotton and had no money to put up as margins, and asked Porter-

field how much money they then had to their credit with Latham, Alexander & Co.; that he replied, about \$2,000 and stated that he, Porterfield, had \$1,000 which he did not need and would send as margins for the cotton; whereupon Spurr assented, and Porterfield sent, of his own means, the \$1,000 as margins, on November 14, 1892, by the following letter:

" NASHVILLE, TENN., Nov. 14, 1892.

Latham, Alexander & Co., New York city.

GENTS.: Referring to your telegram of this date, I enclose herewith draft on New York for one thousand dollars on account of Spurr & Porterfield. If you have any hesitancy on this matter please wire on receipt of this, and will remit what you call for, or if you prefer it close out the account. Please let me know what margins you require on cotton and oblige.

F. PORTERFIELD (*Personal*)."

• That on November 14, 1892, 500 bales of cotton were bought on this account, and sold on November 16, 1892, at a profit of \$595.02; that this profit was sent by check to Porterfield and its proceeds divided equally between him and defendant Spurr; that on November 19, 1892, two other lots of 500 bales each were purchased—one of which was sold on November 25, 1892, at a profit of \$983.20 and the other on December 27, 1892, at a profit of \$624.43, both sums being credited by Latham, Alexander & Co., to Porterfield and Spurr on their account.

Defendant admitted that he authorized these three purchases of cotton, and was fully informed of them by Porterfield.

It appeared that other purchases of cotton were made by Porterfield on this account, namely: 1,000 bales on December 1, 1892, 500 bales on December 27, 1892, and 1,000 bales on February 21, 1893; but defendant testified that he was not consulted about these latter purchases, had no knowledge of them and did not authorize them.

The account of Latham, Alexander & Co., also showed the
75 following purchases of stock which defendant testified he was not consulted about, and did not know of or authorize, namely:

100 shares North America, bought September 29, 1890.

200 shares Reading, bought August 19, 1892.

Porterfield testified that defendant knew all the time that the purchases were continued and the account was kept in force, and they were jointly interested and there was no suggestion of withdrawal between them at any time.

On the 2,500 bales of cotton and the 300 shares of stocks last mentioned, losses were sustained amounting to over \$15,000.

There was also evidence tending to show, that Porterfield sent to Latham, Alexander & Co., on this account, out of the moneys and funds of the Commercial national bank, the following sums, credited on the account at the dates stated, namely:

| | |
|--------------------|------------|
| Nov. 14, 1890..... | \$1,500 00 |
| Dec. 8, 1892..... | 4,000 00 |
| Feb. 7, 1893..... | 1,000 00 |
| Feb. 13, 1893..... | 1,000 00 |
| Feb. 14, 1893..... | 1,500 00 |
| Feb. 18, 1893..... | 1,500 00 |
| Feb 1, 1893..... | 2,600 00 |

Total.....\$13,100 00

Defendant testified that he was not consulted about any of these remittances, had no knowledge of them and did not authorize them; and that they were not necessary to protect any purchase that he had knowledge of or authorized.

Defendant also testified that he had no communication at any time until after the failure of the Commercial national bank, with Latham, Alexander & Co., concerning this account in any way, either in person or by mail or telegraph; that the correspondence was conducted entirely by Porterfield, who reported to him the buying and selling prices, and the profits and losses, on the transactions made by them jointly, which they always conferred about before making them; that he had no knowledge or suspicion that Porterfield was using the bank's funds in this way or in any other transaction for his personal interest or that of others.

There was testimony for plaintiff by Porterfield tending to show that defendant knew of all these purchases made by him, Porterfield, on both of these accounts; and that defendant knew he was remitting the moneys of the bank to New York upon them.

Porterfield, just before leaving the stand, and after having admitted using the moneys of the bank in his various speculations and making false reports in order to conceal the true condition of the bank, but having stated that he did not intend to rob the bank, was asked by counsel for the Government to make any statement or explanation of the matter he wished, and he explained as follows:

"I would state, in regard to those transactions, that some time after the organization of the bank, there was quite a speculative craze here in Nashville in a great many things and some of them were offered to me, out of which money could be made in various speculative enterprises. I was offered an opportunity to go into some of them by some of my friends, and I did go in and made some money, and after that I continued to speculate in various ways, sometimes making and sometimes losing; but there came a time when the losses became heavy, and in keeping up the margins on certain stocks I exhausted my own available means, and then I began to send on moneys of the bank, to use the moneys of the bank, in that way; I took them with no intention of robbing or defrauding the bank; I believed that I would be able to replace these moneys, and I had no criminal intent at the time, but I hoped that everything would revive and I

could in that way replace the money, which I had taken. I had no thought of robbing or defrauding the bank, but I continued to speculate, and afterwards I got beyond my depth, and was obliged, in order to keep up, in the course of time, and not being willing that these matters should appear on the books in a true light, and to the extent of such large amounts, to make entries which were misleading, and did not state the true facts. I knew very well that I was doing wrong all the time, and I could not but believe it, and I felt it more than ever at last when I had to make entries on the books in order to conceal exactly the true state of affairs.

I will say I did not consider I was robbing the bank, because such was not my intention at any time; of course, I can see I was not doing right, in fact, I knew I was doing very wrong, and when the crash came at last and my ruin became utter and complete, I met the punishment that was proper, no doubt, meted out to me; just

77 what I have suffered I would not undertake to say; indeed, I could not, but I should think that any one could understand what a man would suffer when he has lost his good name, and brought stain and dishonor upon it, and dragged others with him, and knows as fully as I do, what others have suffered as a result of his own wrong-doing; that is all I desire to say in regard to this transaction."

There was no evidence tending to show that Dobbins & Dazy, or either of them, had any interest in, or any connection with, either of these accounts of "Frank Porterfield, separate," with Herzfeld & Co., or "Porterfield & Spurr" with Latham, Alexander & Co.

Defendant requested the court to give the following special instruction, being defendant's 14th request:

"14. The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks, through Latham, Alexander & Co., in their joint personal names and with their own means, is not evidence of the dishonesty of either; nor is the fact that they bought in the same way, similar stocks in the name of Porterfield, individually, through Herzfeld & Co.; and if you believe that these accounts were mere personal transactions, not involving the bank in any way, so far as the defendant was concerned, and that he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he cannot be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

Which instruction the court refused, because the subject was covered by other instructions, and to this refusal the defendant then and there excepted.

In addition to the portions of the general charge and special instructions heretofore set out, the court gave the 12th special instruction asked by defendant, after modifying it in a manner not excepted to, as follows:

"12. The defendant is not indicted in this case, nor being tried for buying and selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters. (I interpolate: On his individual account, without involving the bank.) You should not allow the proof on

this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful

use of the bank's funds by the cashier, as before indicated, 78 that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence, on the question whether defendant knew (or was charged with knowing because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

The court also instructed the jury, in the general charge, among other things, as follows:

"The defendant is not on trial directly for his complicity with such previous-speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment."

The plaintiff introduced all its evidence before it rested, no witness being offered by it in rebuttal after defendant's witnesses were examined; nor did the plaintiff offer any evidence as to the general character or reputation to the defendant; nor as to his reputation for veracity or honesty.

The defendant testified as a witness in his own behalf, his direct and cross examinations both being at great length and occupying parts of three days.

Having testified on his direct examination that before making any of the purchases of stocks in 1886 and 1887, mentioned in the testimony for plaintiff, he pledged to Porterfield, cashier, the stocks and securities heretofore mentioned, to secure the bank in such purchases, and that said stocks and securities remained so pledged and in possession of the bank until all the purchases made for him through the bank were closed out, and his note for \$3,254.12 made and secured with part of said stocks, as heretofore stated, he was cross-examined by counsel for plaintiff on this subject as follows:

"Q. You have stated that when you determined to go into those stock transactions, if I caught you correctly, you went to Mr. Porterfield and you deposited with him certain stocks to secure the bank against any loss that might result from any of your transactions in those stocks. Is that correct?

A. Yes, sir.

79 Q. Now, will you kindly state to the jury a list of the stocks that you deposited with Mr. Porterfield on that occasion?

A. My recollection is there was five thousand dollars of Alabama National Bank stock; twenty-six hundred dollars of Prefett, Spurr & Co. stock; eight thousand dollars of Nashville & Lebanon Turn-

pike Co. stock, and seventy-five hundred dollars of Sheffield Land Co. stock; and when I deposited these stocks I said to Mr. Porterfield, I have more stocks, which I can give you if necessary.

Q. Mr. Spurr, are you distinct in your recollection about the seventy-five hundred dollars of Sheffield Land Co. stock?

A. That is my recollection, sir.

Q. I will ask you, to refresh your memory only, whether on May 14, 1894, you did not say, as I read here, "I have no list showing the exact securities that I deposited with the bank, but I have a list showing the securities I had on hand the first of January, 1887, and from that list I can name some of the securities I deposited with the bank. Q. Please name that, Mr. Spurr? A. Eight thousand dollars of Lebanon and Nashville Turnpike Co. stock; five thousand dollars of Alabama National Bank stock; twenty-six hundred dollars of Prewett, Spurr & Co. stock, and from that list I think there were others, but I cannot state positively. That is the list I made the first of January, 1887, of what I had in the way of stocks and securities." Was not that your answer?

A. Yes, sir; that was my answer.

Q. You have refreshed your mind and you are satisfied you put in the seventy-five hundred dollars of Sheffield Land Co. stock?

A. Yes, sir; and I said at that time that I was not positive, but I thought I had deposited seventy-five hundred dollars of Sheffield land, and I am positive now that I did.

Q. Now, what has, since that time, called your mind to the fact that you put up that Sheffield & Birmingham stock—\$7,500 in addition?

A. I think that, Mr. Baxter, sometimes, when a question is raised you might not remember it, and if you think about it, it grows upon you and the conviction becomes positive. I want to state right here that such instances have occurred in the last year or two in regard to the bank affairs. Sometimes I have been asked by the proper officials about a transaction about which I had no
80 recollection, but after being allowed to think about it, and look into it, the thing became very fresh in my mind, and that applies to a great many transactions.

Q. You have given this matter considerable thought, and you are now satisfied you did put in the \$7,500 of Sheffield & Birmingham stock?

A. Yes, sir.

Q. Now, are you satisfied that is all you have put in which you have enumerated, that you have enumerated all the stock you put in with Mr. Porterfield?

A. Yes, sir.

Q. Tell the jury what that \$7,500 of Sheffield & Birmingham stock was worth?

A. It was worth \$15,000.

Q. That makes \$15,000, then?

A. Yes, sir.

Q. Tell the jury what the other stock you put up was worth?

A. The Lebanon & Nashville Turnpike stock was worth, at a low figure, 50c. and I considered it worth more.

Q. There was \$8,000 of that, and that would make \$4,000?

A. Yes, sir.

Q. Now, the other stock?

A. The Alabama National Bank stock, my recollection is, was worth 110 about that time.

Q. Now, Prewett & Spurr stock?

A. That was about 140, I think.

Q. Now, I will ask you if you did not state on the same occasion that I have asked you about, if this question was not put to you and you made this answer:

Q. "Then, if I understand you correctly, the stock that you pledged to the Commercial national bank to secure it against loss on these purchases made by you amounted, at that date, according to your best recollection, to about \$13,400 in cash, if I am right in my figures? A. That is right."

A. That is my recollection of the way I stated it.

Q. To those you now add the Sheffield & Birmingham stock at \$15,000, and if I understand, the total value of securities you put up to secure the bank amounted to about \$28,000 or \$29,000?

A. I have not figured them out, and I don't know.

Q. That would be that, would it not?

A. Between \$25,000 and \$30,000.

Q. Now you mention that \$15,000 of new stock; that would amount to about \$28,000, would it not?

81 A. Yes, sir.

Q. Now, as I understand, Mr. Spurr, you deposited with Frank Porterfield about \$28,000 in value of various kinds of stock to secure the bank. On what day did you make that deposit?

A. I don't remember the day.

Q. Can you remember the year?

A. In 1886, I know.

Q. Was it the first part or the latter part of 1886?

A. I don't remember, sir, what part; I think it was the latter part—some time in the latter part of the year—but I don't remember when.

Q. Then, if it was the latter part of the year, was it in August, September, October, November or December?

A. I have no data, Mr. Baxter, showing the month.

Q. Don't you think you could refresh your mind on that and give us the day?

A. No, sir; there is nothing I have been able to come across yet that will give the date.

Q. Did you just hand them to him in a bundle or put them in an envelope?

A. I put them in an envelope showing the contents.

Q. Was there anything on the envelope to show what you put in the envelope?

A. No, sir; it was a custom of the official receiving the collaterals to put that there himself.

Q. Well, did you see him put anything on it when you handed it to him?

A. Well, I don't recollect. I was not watching Mr. Porterfield about those little things. I just made a statement to him and told him what was there, and took it for granted he made the proper entry, put the proper writing upon the envelope.

Q. Your certificates were all endorsed in blank?

A. Yes, sir.

Q. Did you take any receipt from him?

A. No, sir; I did not. I never took a receipt from a banker for any collateral placed with him.

Q. Did you take any memorandum of any kind from him?

A. I did not, sir.

Q. So, in case of his death, or your death, there would have been nothing to show as to who those stocks belonged, if they were endorsed in blank?

A. Yes, the memorandum he made on it; I took it for granted that he made a memorandum upon it.

Q. But you didn't see him make any?

82 A. I did not. I have no recollection of seeing him make any, and I know it was my custom, whenever collaterals were placed with me, to do that.

Q. If I understand you, Mr. Spurr, you carried an envelope to Mr. Porterfield containing about \$28,000 worth of stocks and securities and endorsed in blank, and without seeing him make any memorandum upon it, and without getting any memorandum or receipt whatever from him, you left them with him?

A. I have no recollection of seeing him make any memorandum, and I took no receipt, because that was never done; I never knew it to be done."

The defendant, on direct examination, also testified, in substance, that he did not know or have any information or suspicion that Dobbins & Dazy's account in the bank was overdrawn at any time during the period covered by the checks mentioned in the indictment; that while acting as cashier during Mr. Porterfield's illness in December, 1890, and January and part of February, 1891, he caused to be opened and kept by the book-keepers two little overdraft books, one for each of the two individual ledgers, for the purpose of showing the overdrafts of customers; that after the bank failed and he was charged with certifying checks of Dobbins & Dazy, remembering those little books and that he had never seen any overdraft of Dobbins & Dazy upon them, he inquired for them, both of the bank examiner while in charge, and afterwards of the receiver, and was told that none of them could be found—it having also appeared by plaintiff's proof that all of said overdraft books had been lost and could not be found, except the first one, containing overdrafts on individual ledger A to K up to April, 1891; that he had never known of the Dobbins & Dazy account being overdrawn, except that on one occasion during the early period of the account he inquired of Porterfield how the account was getting

along, and he, in response, informed him that it had been overdrawn, but had been made good; that he now and then made such inquiries of Mr. Porterfield, and his reply always was that it was perfectly satisfactory and very profitable; that the custom of the Commercial national bank in reference to certifying checks and marking them good was, that when a check was presented by a customer for certification with a view of going into circulation, and the customer had sufficient funds in the bank, the teller stamped it with a certification stamp kept for that purpose,

83 containing the words "Certified, Commercial national bank, Nashville, Tenn. ———, teller"—the blank space being left for the teller's name to be written in—and it was then passed through the account of certified checks, but where a check was presented by an associate bank of the city between settlement hours, and the drawer had sufficient funds in the bank, such check was marked "Good" by some officer of the bank simply as an indication that it would be paid at the next settlement hour, and no entry was made of it on certified check account, and that there was no custom of the bank making any distinction in the form of the certification or the officer by whom it was made based on the fact that the money was there or was not there—that no custom of the bank recognized the right of any officer to either certify with the stamp or mark "Good" a check when the drawer did not have sufficient funds in the bank to meet it; also that on account of the large amount of money required to handle the Dobbins & Dazy account, and the necessity of sometimes selling New York exchange to meet the balances due the other banks on daily settlements, Mr. Porterfield gave instructions for all checks of Dobbins & Dazy to be sent back to him and their deposits reported to him, that he might be constantly advised of the same and have opportunity to sell exchange to meet balances if necessary; and that he believed at the time he certified every check of Dobbins & Dazy which he did certify, from information received by him at the time from either Mr. Porterfield or the exchange clerk, that Dobbins & Dazy had sufficient funds in the bank to meet the check.

And thereafter defendant was cross-examined on these subjects by counsel for plaintiff at great length as follows:

"Q. I understood you to say you did not know from November 25, 1892, until the bank failed, that you had no knowledge during all that time, that Dobbins & Dazy's account was overdrawn a single day during all that period?

A. I do say so, sir.

Q. And you thought that every day during that period they had a credit balance?

A. I don't say I thought about it every day. As far as my knowledge extends, I had no knowledge of that account being overdrawn during those dates.

Q. Had you ever heard from any one during those dates that the account was overdrawn?

A. Never had.

84 Q. And never heard any intimation of it?

A. No, sir, none whatever; no suspicion of it.

Q. Do you know of any one else who worked in that bank, from the porter, who swept the floor, to the president of the bank, that did not know that Dobbins & Dazy's account was largely and continuously overdrawn during that period except yourself?

A. I don't know, sir; I never discussed that question with any of those clerks; I never asked them what they thought about it and what they heard.

Q. I was asking you if you knew or could give the name of any one in the bank that did not know of it?

A. I cannot. I never heard them discuss it, and don't know what they thought or what they had heard.

Q. Mr. Spurr, you stated in your original examination with reference to the overdraft books, as follows: 'I went to my attorney and stated that overdraft books had been kept in the bank showing the amounts overdrawn by any of the individual depositors and my recollection was then, and was very strong, that I had never seen the name of Dobbins & Dazy on that account.' Was that correct?

A. Yes, sir.

Q. Did you mean, in that statement, to your attorney, that you had seen the overdraft books and that they were kept after Dobbins & Dazy's account had been brought to the bank and that they did not show any overdrafts of Dobbins & Dazy on them?

A. That is what I believed at the time.

Q. That you had seen the books after that?

A. I had seen them for some time—

Q. After Dobbins & Dazy's account was brought to the bank?

A. Yes, sir.

Q. And that there was no overdrafts of Dobbins & Dazy appearing on the books when you saw them?

A. Yes, sir.

Q. You stated on your original examination with reference to the taking of the Dobbins & Dazy account by the bank: 'I remember very well Mr. Dudley's making the point that a house like that would want a great deal of money, that it might be overdrawn and likely would be overdrawn, and he was opposed to it. He stated that very emphatically and I understood our instructions were, so far as I can recollect, that it should not be done, that it was understood that it should not be overdrawn.' Is that correct?

A. Yes, sir.

85 Q. Did you not object to the taking of the account, that it would be difficult to furnish the necessary currency to handle it?

A. Yes, sir.

Q. Did you not know soon after the account of Dobbins & Dazy was taken by the bank that it was overdrawn?

A. I have stated that I had heard that it had been overdrawn but that it had been made good, and my recollection was it was in

response to an inquiry by me to Mr. Porterfield in regard to it, as to how the Dobbins & Dazy account—how they were getting along.

Q. Had anybody told you that it was overdrawn?

A. That led me to ask that question of Mr. Porterfield now and then, just like Major Dudley, how the account was getting along.

Q. You had not heard when you asked that question that the account had been overdrawn?

A. My recollection is as I have stated.

Q. Well, I don't think you have stated that, Mr. Spurr, in your original examination.

A. I have stated to you just now, Mr. Baxter.

Q. Well, I don't understand you to answer that question yet; did you or not?

A. I have stated yes, that I did.

Q. Then you had heard that the account was overdrawn before you made that inquiry?

A. That is my recollection and it was in response to an inquiry that I had made of Mr. Porterfield as to how the account was getting along, how they were going, I mean to say, how Dobbins & Dazy were getting along.

Q. My question was, when you asked Mr. Porterfield that question, how the account was getting along, had you heard before you asked that question that the account had been overdrawn?

A. No, sir; that was the only time I had heard it was overdrawn.

Q. When you certified the checks of Dobbins & Dazy, did you ask the teller or the ledger book-keepers of the bank, if the account of Dobbins & Dazy was overdrawn at the time?

A. I did not.

Q. Did you know then whether they had the money to their credit sufficient to cover the checks which you certified?

A. No, sir; I did not.

Q. Mr. Spurr, when a customer of that bank had money to 86 his credit, who, according to the usage and custom of the bank, certified the checks?

A. When a customer presented a check for certification and he had the money to his credit, what we call a certified check, it was stamped and signed by the teller; that is when it was going into circulation, but when a check was presented by an associate bank and the man had the money to his credit or the depositor had the money to his credit, it was marked good by the teller, by the cashier, the assistant cashier or president.

Q. Then, if I understand you, whenever a check was presented for certification it was marked good if it was intended to be used here in the city and not to go into circulation, but turned in at the exchange hour, either the teller, cashier, assistant cashier or president marked it good whether there was any money there or not, is that true?

A. No, sir; I did not say that.

Q. Well, suppose there was money to his credit, who marked the check then?

A. It was the custom of the bank whenever a check was pre-

sented to be certified and the man had the money to his credit for the teller to mark it good or to be marked by the officers mentioned; that is, when the money was actually on deposit, or it was known that he had the money there.

Q. I am not asking for any difference between the checks that were certified to go into circulation and checks certified for the use of some bank here to be returned at the exchange hour. I am not asking for the difference of that kind, but I am asking for the difference when a customer had money in bank and when he did not. My question to you is, when a check was presented for certification what was the difference in certifying it whether the man had the money to his credit in bank or whether he did not; that is, according to the usage of the bank?

A. It was not the custom of the bank to certify or mark good any check unless the money was on deposit to the credit of the individual as I have stated. When a customer or depositor had money to his credit and he wanted it to go into circulation, why it was usually certified with a stamp by the teller, but where it was presented by an associate bank with a view of coming in at the next exchange or settlement hour, it was marked good by the teller, cashier, assistant cashier or president.

Q. Was it marked good by the cashier, assistant cashier or teller without reference to whether the drawer of the check had the money in bank or not?

87 A. I can only state in regard to these checks where the information came from.

Q. I am not asking about these Dobbins & Dazy checks, but I am asking about checks generally that are marked good or certified without regard to who drew them.

A. I can just state to you what I have already stated. A man might present a check for, say five thousand dollars, and the cashier might know that he had the money to meet it although it had not passed to the books, then it would be certified by him, or the assistant cashier or perhaps president.

Q. Without stopping to inquire?

A. Without referring to the teller at all.

Q. And without stopping to examine whether the account was overdrawn more than five thousand dollars or not?

A. No, sir, I did not say that at all.

Q. Was it not the practice of the cashier, assistant cashier or president, when they certified a check to see whether the man had the money to his credit or not? When a man had a note discounted, say for five thousand dollars, would they see whether his account was or was not overdrawn more than five thousand dollars before they certified a check for it?

A. I should think it would be. I had reference to this specially; frequently an account is opened with a bank by a loan and the proceeds of that loan would not appear upon the books of the bank at all, and when a check was presented in that way the cashier would mark it good.

Q. But I am asking where a man, like Dobbins & Dazy have

already gotten an account with the bank and the account is overdrawn from day to day, anywhere from twenty-five to one hundred thousand dollars a day, if they come in to get a note discounted for five thousand dollars, would you certify a check for forty or fifty thousand dollars without making inquiry as to whether the account was overdrawn that day or not?

A. If I had any sort of suspicion that the account was overdrawn, or if I knew it—I mean now in regard to Dobbins & Dazy's account. It was understood and I got my information from Mr. Porterfield that he kept up with that account almost hourly; that he knew its deposits, and that he knew its checks, and for that reason I believed he was familiar with it and I went to him and got my information in regard to that account.

Q. That is, you went to Mr. Porterfield in reference to the Dobbins & Dazy checks when you certified them?

88 A. I did, sir.

Q. Then you went to Mr. Porterfield with reference to Dobbins & Dazy's checks when you certified them?

A. Yes, sir.

Q. Tell us what you did about other people's checks. Did you go to Mr. Porterfield about other people's checks when you certified them?

A. I really had nothing to do with that. Of course I can recollect instances where I marked checks good, but those were matters that were rarely referred to me.

Q. You have certified checks for other people, other than Dobbins & Dazy have you not Mr. Spurr?

A. Yes, sir, I have.

Q. Now, my question to you was, When you certified checks other than Dobbins & Dazy, did you go to Mr. Porterfield for information or who did you go to?

A. It depends upon the hour of the day.

Q. Just take any hour of the day; I am not particular about the hour of the day.

A. I will say this; I went wherever I thought I could get the information, the teller, or book-keeper.

Q. Who is the proper man to go to in the bank when you want to know whether an account is overdrawn? I am not talking about Dobbins & Dazy's, but anybody's. Suppose I had an account with the Commercial national bank and I wanted you to certify a check, who would you, in the ordinary course of business, go to, to find out whether or not you could certify that check?

A. Either go to the book-keeper or teller and ask him what he knew about it.

Q. The teller or the book-keeper would be the ordinary place to go for such information?

A. Or I would refer the matter to the cashier.

Q. Would you suppose the cashier in the back of the bank would know?

A. The cashier was right along with the clerks.

Q. Wasn't he at the back of the bank close to you?

A. No, sir, he was not close to me.

Q. Wasn't he nearer to you than to the teller of the bank?

A. Yes, sir, a little nearer.

Q. Now, why wouldn't you go to the teller or the book-keeper to find out about it?

A. I would go to whoever I thought would give the information. It was a matter I did not have to look after much and which I had scarcely anything to do with and in this instance I was relying on the information I got from Mr. Porterfield on this account.

89 Q. Now, I will ask you if you can remember one single instance where the teller of that bank ever refused to certify a check of a customer who had the money to his credit?

A. I don't know anything about it.

Q. You cannot recollect any such instance?

A. I have no recollection of anything of that kind and it would not come before me.

Q. Did you ever certify a check for any one except Dobbins & Dazy for as much as ten thousand dollars?

A. I can't recollect whether I ever have or not, sir.

Q. I place before you the certified check account found in general ledger No. 3, which has been proven that it covered a period from July 11, 1890, to the failure of the bank in March, 1893; will you please look through that account and state the largest certified check that you can find in that whole account from July 11, 1890, down to the failure of the bank?

A. This is July, but I don't know what year it begins. You want to know the largest check I find here? Here is one for \$9,198.63; here is one for \$5,000.

Q. See if you can find anything over \$9,000?

A. Here is one for \$4,900; one for \$5,000; another of \$5,000; another of \$4,250; another for \$4,952; another of \$5,000; another \$5,426.66. That is all that are \$5,000 and over. This ends in August, 1892.

Q. The largest check you found on that ledger was between nine and ten thousand dollars?

A. Yes, sir.

Q. Now, what is the largest check on the next ledger there before you?

A. Here is one for \$8,248.10. That is the largest of these that appear here.

Q. Then, between nine and ten thousand dollars is the largest check you can find certified on either of those ledgers?

A. Yes, sir.

Q. Did you know that Mr. Fuller, the teller of the bank, certified some of the checks of Dobbins & Dazy?

A. I did not, sir.

Q. Did you know that Mr. Scoggins, the assistant cashier, had certified some of them?

A. No, sir.

Q. Didn't you ask Mr. Scoggins to certify some of them?

A. No, sir; Mr. Scoggins has testified I told him I knew nothing

about a certain check ; that Mr. Porterfield said was all right. I knew nothing about it.

90 Q. Were not there two occasions when these young men from the Fourth national bank brought checks to Mr. Scoggins and he brought them back to you, on two occasions?

A. No, sir ; I don't remember it, sir.

Q. Do I understand you to say it did not take place as those young men stated?

A. No, sir ; I do not say those young men did not bring checks to Mr. Scoggins.

Q. Do you say Mr. Scoggins did not take them back to you?

A. No, sir ; all I know about it is what he said here on his oath. I had no recollection when this trial first came up of his having brought a check to me under any circumstances.

Q. Did you know Mr. Porterfield was certifying any of the checks?

A. I knew that he had certified a few checks, but how many I didn't know. At least, I had seen him certify two or three or four.

Q. Do you remember when Mr. Bowron testified here, one of those young men, that he brought you a check and you told him to take a seat and wait until Mr. Porterfield came back?

A. I don't remember Mr. Bowron at all. I remember messengers from the Fourth national bank presenting checks.

Q. Do you remember telling the young man to wait there until Mr. Porterfield came back?

A. My recollection is I did.

Q. Do you remember telling him the reason that you wanted him to wait was, Mr. Porterfield attended to that?

A. Very likely I did.

Q. What matters were you referring to?

A. Mr. Porterfield wished to keep up with this account of Dobbins & Dazy, as I have already stated, to know its condition almost hourly with a view of enabling him to provide means to meet any balance that might come against it. He kept up with it and that is what I referred to, that he looked after those things and when those things were presented to me I was a very busy man and was fearful I might fail to report to Mr. Porterfield any checks I might mark good and, as I said, he was looking after it and it was his wish that those matters should all come to him and be referred to him.

Q. A young man had come to you to get you to certify the check of Dobbins & Dazy ; isn't that so? Well what about it ; he came for that purpose?

91 A. So I stated.

Q. Now, you told him, knowing that he came there for you to certify that check, that Mr. Porterfield attended to those matters?

A. Yes, sir, and I have stated why I wanted him to wait.

Q. Now, here are the checks that were certified either by you or by Mr. Porterfield or by Mr. Scoggins or by Mr. Fuller. Now, do I understand you to say, as president of the bank, all of those checks were certified between November 25, 1892, to the failure of the bank,

some of them for as much as forty thousand dollars apiece, and that you did not know they were being certified at all?

A. I do state so, sir.

Q. Was Mr. Porterfield in the bank when Mr. Bowron brought you the checks to be certified that he testified about?

A. I have stated that I do not remember Mr. Bowron.

Q. Was Mr. Porterfield in the bank when Mr. Davis brought the checks to you to be certified?

A. I make the same answer because I do not remember Mr. Davis at all. I cannot recall the young man at all; it may have been him.

Q. Now, I understand you in your original examination to say that 'Mr. Porterfield notified you that he had instructed the teller to send all the checks of Dobbins & Dazy back to him without exception, as you understood, and that his idea was this; that his object in having that done was that he might keep fully posted, almost hourly you might say, in regard to the condition of that account.' Does that report you correctly?

A. Yes, sir.

Q. Now, did you ever know Mr. Porterfield to issue an order of that sort with reference to any account except Dobbins & Dazy?

A. No, sir, I don't know that I did. I think it is proper to state why I thought he did it.

Q. You say; 'they were buying and selling large amounts of cotton and the deposits from them were in the nature of drafts or exchange bills as they are sometimes called, drawn upon New York, and deposited for that account, and they had a right to check against it at once for the money or currency if necessary and it was necessary in order to get this information to be posted almost hourly in order that he might know what was going against him through the exchange, what checks were coming, so that he might get out, if necessary, and sell exchange on New York in order to meet these things, these demands of Dobbins & Dazy.' Is that the reason?

A. That is my recollection of what I stated.

Q. Now, if these checks had been brought back to Mr. Porterfield after they had been certified by the teller, could he not have kept up with the account just as well as if they had been brought back before they were certified?

A. I think he could, sir, but I think those young men testified that they went back to Mr. Porterfield and did not go to the teller, these messengers from the banks.

Q. Well, then, if Dobbins & Dazy had the money to their credit in the bank when these checks were presented why would it not have been proper for the teller to have certified the checks and then report it?

A. I did not say that it would have been improper.

Q. Would not that have been the proper way to do the business?

A. I only know about the Dobbins & Dazy account what Mr. Porterfield told me. He gave me reasons that seemed to be satisfactory. I knew something about meeting those accounts that came

through that exchange hour or the settlements; in fact, I know he several times called on me to go out and assist him in selling that exchange.

Q. You were asked upon your original examination with reference to the certification of Dobbins & Dazy's checks, viz: My question is, whether you remember the particular circumstances of your marking all of them.

A. I was going to state that there was only one check there that I can remember specifically when I marked it good, and that is dated Dec. 17, 1892. It was brought about in this way; to my recollection Mr. Porterfield was out of the bank at the moment the check was presented to be marked 'Good' and I was standing at his desk when the young man, the messenger from the other bank, presented it to me. I had been out of the city for a number of days and had just got back and looked down the hallway as it is called and saw Mr. Porterfield and waited until he came up to me.

Q. Saw whom?

A. Saw Mr. Porterfield and waited a few moments until he came up to me and I said 'Is this check good?' and his reply was, very prompt, 'For that amount and more' and upon that assurance I marked it good and signed it as president. In regard to the other three, I have no distinct recollection as to the immediate surroundings.

Q. Now that happened to be the check you certified on that day for thirty-one thousand dollars when Dobbins & Dazy had not deposited anything at all in the bank is it not, Mr. Spurr?

93

A. I do not remember, sir, whether they deposited anything at all on that day or not.

Q. Look at the ledger there on December 17, 1892.

A. No, sir; there is nothing deposited on the 17th as the books show.

Q. And that is the check you remember so particularly about?

A. Yes, sir; but according to the developments here the deposits on the 19th might have been put into the bank on that day.

Q. But the ledger does not show any deposit on that date.

A. No, sir. Anything coming after two o'clock would not be entered until the following day, and Sunday came in between the 17th and 19th.

Q. Look at December 16th, and tell the jury how much Dobbins & Dazy were overdrawn the day before you certified that check?

A. \$19,503.

Q. Now, look on December 17th, how did the account stand?

A. Overdrawn, \$51,072.65.

Q. That is the day you certified that check for \$31,000?

A. Yes, sir.

Q. Now turn to December 9, 1892, and see how much they were overdrawn on December 8th, the day before?

A. \$114,194.01.

Q. That is at the close of business on the 8th, and on Dec. 9th, you certified a check for them for fifteen thousand dollars?

A. Yes, sir.

Q. How much were they overdrawn at the close of business on December 9th?

A. \$64,417.97.

Q. Do you remember where you were standing when you certified that check?

A. No, sir.

Q. You don't remember whether you were standing at your desk or not?

A. No, sir; I don't remember whether standing or sitting.

Q. Had you been out of the city a number of days before you certified that check?

A. No, sir.

Q. Did you look down the hallway that day before certifying that check?

A. No, sir; I did not.

Q. Did you wait until Mr. Porterfield came up to you before you certified it?

94 A. I did not, sir.

Q. Now turn to January 2, 1893, of Dobbins & Dazy's account and tell the jury how much it was overdrawn at the close of business on January 2d?

A. January 2d, is not here.

Q. Then the first day before that?

A. December 31st, overdrawn, \$47,223.09.

Q. Then on January 3d, you certified a check for forty thousand dollars?

A. I think that is the amount.

Q. Mr. Spurr, look back there and see if on the 31st of Dec. the overdraft was not \$77,515.59.

A. That was the beginning of that day. At the close of business it was \$77,515.59.

Q. What was the overdraft at the close of business on January 3d, the day you certified the check?

A. \$38,125.84.

Q. Now turn to Feb. 12, 1893, and state to the jury how the account stood at the close of business on that day?

A. February 12th, does not appear here.

Q. Well, the first day before that.

A. The 11th?

Q. Yes, sir.

A. The account was overdrawn \$49,454.69.

Q. Now, on the next day, February 13th, you certified a check for \$9,641.95, did you not?

A. The 13th?

Q. Yes, sir.

A. I cannot say that I recollect the dates, about that.

Q. What was the overdraft of Dobbins & Dazy at the close of business, February 13th?

A. \$68,243.73.

Q. Was Porterfield standing at his desk when that check was

brought, or were you standing at Porterfield's desk when that check was brought to you ?

A. I don't know where I was standing.

Q. Had you been out of the city for a number of days before that check was brought to you ?

A. No, sir ; I don't think I had been away from home at that time.

Q. Did you look down the hallway that time ?

A. I don't know, I may have done so.

Q. Well, did you wait until Mr. Porterfield came to you before you certified the check ?

A. No, sir ; I don't think I did."

Defendant also testified on direct examination, in substance,
95 that he had nothing to do with receiving, discounting or handling the New York drafts deposited by Dobbins & Dazy in the Commercial national bank, and did not remember ever to have seen one of them ; and thereafter he was cross-examined by counsel for the plaintiff on this subject as follows :

" Q. Do I understand you to say on your original examination that these drafts Dobbins & Dazy were depositing in the Commercial national bank, as cash, you never saw any of them ?

A. No, sir, I have no recollection of having seen any of them.

Q. And you thought all of them had bills of lading attached ?

A. Yes, sir, that is what I believed, that they represented actual purchases of cotton and that was the understanding from the beginning as to what their business would be and how it would be conducted.

Q. You stated on your original examination, that on July 11, 1892, you telegraphed the National Bank of the Republic at the request of Dobbins & Dazy, to hold up on a draft for \$15,000, dated July 8, 1892, that had been deposited by Dobbins & Dazy in your bank ?

A. Yes, sir, that reminds me that such a thing was done.

Q. You thought that draft had bills of lading attached to it ?

A. I had no reason to question it, that there was—the question did not enter my mind. It was simply a request that it be held up.

Q. Did you ever know of a party requesting a draft to be held up with bills of lading attached ?

A. I never knew it but I was told it was a very common occurrence ; I never had any experience in handling a cotton account and those things never came under my observation, but I had always heard there were difficulties and delays and protests and all that sort of thing.

Q. I understood you to say that you had no recollection that you had ever seen any of those drafts ?

A. That is my recollection.

Q. I will ask you if you did not say on May 29, 1894, in this room, as follows, in answer to this question :

' Did you receive or see any of these pieces of exchange discounted, received and placed to the credit of Dobbins & Dazy by the bank,

mentioned in these questions? A. I did not. It was a matter that never came before me, but I have seen them in the hands of the exchange clerk and frequently asked him about their depositing exchange.'

96 A. I don't recollect it, sir; but I may have said it. My recollection is that they were never brought to my attention, that there was anything missing or irregular about Dobbins & Dazy's account. I am positive about that."

And thereafter the defendant called and proposed to examine witnesses as to defendant's good character, and defendant's counsel having asked a witness, Mr. John Overton, preliminary questions touching his age and residence, and the witness having stated his acquaintance with defendant for about thirty years, the following proceedings were had:

"Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER: The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS: If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity during the entire period that he had lived in Nashville up to the time of this investigation and subsequent thereto.

The COURT: The question now is, not your right to put the defendant's character in issue, but as to the time in which you can prove his general character. I have no doubt, but he has the right to put his general character in issue, but the question now inquired into is as to the time of the limitations within which it can be done. The rule which allows the defendant to offer proof of his character, is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not; but I think the time to which the testimony should relate in regard to his good character should also have reference to that time. Now, there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present and as to whether the defendant's reputation stood un-

97 tarnished since this transaction or since his arrest. Now, I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaint-

ance, his familiarity with the defendant and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions, and then ask him what that character was, if the preceding questions have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case, that is, the respondent's character for truth and veracity, I am not satisfied that you have a right to go into that question generally, unless his character has been attacked by the evidence on that subject.

Mr. PITTS: I would like to submit to your honor some authorities and be permitted to say something on that branch of the case.

The COURT: Very well, I will reserve that question if you think you can convince the court of the error of his ruling, but I will overrule in respect to the first one in regard to the defendant's character, that you are limited to the time when these transactions occurred.

Mr. PITTS: I think it is proper to state to your honor what I expect to prove by these witnesses.

The COURT: I understand what you expect to prove and I overrule that proposition.

Exception taken for the defendant.

Q. Now, Col. Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time, as the court has limited me, to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity?

Objected to.

The question as to the admissibility of this evidence was argued by counsel, and the court stated that the evidence would only be permitted as to the character of the witness up to the time of the failure of the bank, and that after an examination of the question, the court would announce tomorrow morning whether or not the other part of the evidence offered would be admitted."

Other witnesses were then examined under the same ruling and limitation—counsel stating to the court that he wished to ask all of them as to the character of defendant for truth and veracity during their entire acquaintance with him down to the present time, also that he wished to ask them as to his character for honesty and integrity during the same period; and that he expected to prove by all of the witnesses that his character was good in both respects.

The court upon statement of the district attorney that the Government admitted defendant's good character for honesty and integrity down to the period of the charge of the indictment, limited defendant to ten witnesses as to character; and that number was examined under the above ruling and limitation, embracing farm-

ers, merchants, physicians, mechanics, and State and county officials.

On the morning succeeding the argument of the question, the court announced its adherence to the ruling above stated, and to this ruling the defendant excepted.

Defendant's insistence was, that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely; but the court, without determining this question, based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad character; and held that there having been no proof offered by the plaintiff, of defendant's bad character as a witness, no proof of his good character for truth and veracity could be offered by the defense.

In the subsequent argument of the case before the jury, counsel for plaintiff argued and insisted that defendant had not testified truthfully and that his testimony was unreasonable and not worthy of belief; and on this subject, the court, in the charge to the jury said:

"Nevertheless, he (referring to defendant) testified that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."

Defendant tenders this his bill of exceptions, which he prays may be signed, sealed and made part of the record in the cause, and it is accordingly done, this 13th day of February, 1897.

(Signed)

H. F. SEVERENS,

U. S. Judge, Acting under Designation.

We agree that the foregoing bill of exceptions is correct.

(Signed)

TULLY BROWN, *U. S. Att'y.*

ED. BAXTER,

Special Ass't to U. S. Att'y.

PITTS & MEEKS,

Att'ys for Def't.

I, H. M. Doak, clerk of the United States circuit court in and for the middle district of Tennessee, do hereby certify that the foregoing is a true, full and perfect transcript of the record and proceedings in the case of *The United States versus Marcus A. Spurr*, No. 7994 consolidated, as the same appears and remains of record and on file in my office.

In witness whereof I have signed my name and affixed the seal of said court at office in Nashville, this the 29th day of March, A. D. one thousand eight hundred and ninety-seven, and of the Independence of the United States the 121st year.

[SEAL.]

H. M. DOAK, *Clerk*,
By E. L. DOAK,
Deputy Clerk.

100 And afterwards, to wit, on April 8th, 1897, a petition was filed in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error, }
v.
THE UNITED STATES, Defendant in Error. }

Petition of Marcus A. Spurr.

To the honorable the judges of the United States circuit court of appeals for the sixth circuit, sitting at Cincinnati:

Humbly complaining, your petitioner, Marcus A. Spurr, plaintiff in error in the above-entitled cause, respectfully shows:

1. That he has been convicted and sentenced to two and one-half years' imprisonment in the penitentiary, in the above-entitled cause, heretofore in the circuit court of the United States for the middle district of Tennessee, upon a charge of willfully certifying falsely a certain check drawn upon the Commercial National Bank of Nashville, Tennessee, whilst he was president thereof.

2. That petitioner is not guilty of said offense; that he is advised that there are manifest errors in the record and proceedings upon which his said conviction and sentence are based; and that he has heretofore sued out and obtained a writ of error in due course, to have the said conviction and sentence reviewed and reversed by this honorable court, and has lately, on the 30th of March, 1897, caused to be filed with the clerk a full transcript of the record and proceedings in said circuit court, duly authenticated, and a statement of docket fee, to cover clerk's costs, and of an estimate of the cost of printing the said record has been made and furnished the attorneys of petitioner, by the clerk, which is herewith filed as a part thereof, marked A.

3. That owing to his poverty petitioner is unable to pay the said docket fee and cost of printing the record, that he verily believes that justice requires that said record should be printed, and he herewith files a statement of Hon. Tully Brown, United States district attorney for the middle district of Tennessee, bearing on the subject, marked B, as a part of this petition.

101 Petitioner prays the honorable court to grant an order directing that the cause be docketed for trial and that the record be printed at public expense.

Petitioner makes no question upon the two trials of the cause, one

before Hon. Geo. R. Sage, and the other before Hon. Wm. H. Taft, each resulting in a mistrial, and is willing that such portions of the transcript as relate to those trials be omitted from the printed record; and petitioner will ever pray, etc.

MARCUS A. SPURR, *Petitioner.*

PITTS & MEEKS, *Attorneys.*

Personally appeared before me, H. M. Doak, clerk and commissioner of the United States circuit court for the middle district of Tennessee, Marcus A. Spurr, the above petitioner, and made oath that the above petition is true to the best of his knowledge and belief.

H. M. DOAK, *Clerk.*

EXHIBIT "A."

United States Circuit Court of Appeals for the Sixth Circuit.

Clerk's office; Frank O. Loveland, clerk.

CINCINNATI, *Mar. 30.*

Messrs. Pitts & Meeks, Nashville, Tenn.

GENTLEMEN: The transcript of the record from the circuit court of the United States for the middle district of Tennessee in the case of Marcus A. Spurr vs. The United States, in which your name appears as counsel for the ——— is received. Before the case can be docketed a fee of \$35.00 must be paid and appearance of counsel docketing the case entered. Please give this immediate attention. Enclosed find appearance, which kindly sign and return to me.

Records must be printed under the supervision of the clerk, and the estimated cost thereof deposited with him within ten days from the date of this notice.

The estimate for printing in the above case is \$160.00.

Very truly yours,

FRANK O. LOVELAND, *Clerk.*

102 "The clerk shall supervise the printing of all records, and upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid the writ of error, or appeal, may be dismissed upon the motion of the opposite party or by the court of its own motion."—Rule 23, sec. 1.

EXHIBIT "B."

From the Circuit Court of the United States for the Middle District of Tennessee.

MARCUS A. SPURR, Plaintiff in Error, }
vs.
THE UNITED STATES, Defendant in Error. }

This is a conviction and sentence of imprisonment of the plaintiff in error for willful false certification of checks while president of a national bank. It is a case of importance, involving many questions, and the record is one which, in my judgment, ought to be printed.

TULLY BROWN,
U. S. District Attorney.

And afterwards, to wit, on May 4th, 1897, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v.
THE UNITED STATES. }

Motion to printed record herein at public expense was argued by Mr. Pitts in behalf of the appellant and is submitted to the court for its order.

103 And afterwards, to wit, on May 24th, 1897, an order was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v.
THE UNITED STATES. }

The motion herein to print the record at public expense is hereby denied.

And afterwards, to wit, on November 15th, 1897, an order was entered upon the journal of said court in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v.
THE UNITED STATES. }

Error to the circuit court of the United States for the middle district of Tennessee. Before Judges Barr, Ricks, and Swan.

This cause came on to be heard this day and was argued by Mr. John A. Pitts and Mr. B. P. Waggener for the plaintiff in error and by Mr. Ed. Baxter for the defendants in error and the hearing is continued until tomorrow.

104 And afterwards, to wit, on November 16th, 1897, an order was entered in said cause which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v.
THE UNITED STATES. }

Error to the circuit court of the United States for the middle district of Tennessee. Before Judges Barr, Ricks, and Swan.

This cause came on this day to be further heard and was argued by Mr. Ed Baxter for the appellees and by Mr. B. P. Waggener for the appellant and is submitted to the court for judgment.

And afterwards, to wit, on June 1st, 1898, a judgment was entered in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v.
THE UNITED STATES. }

Error to the circuit court of the United States for the middle district of Tennessee.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the middle district of Tennessee and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be and the same is hereby affirmed and the cause is remanded to the circuit court of the United States for the middle district of Tennessee for such proceedings therein as may be in conformity with the judgment and opinion of this court and that

105 the mandate of this court issue accordingly.

And afterwards, to wit, on June 1st, 1898, an opinion was filed in said cause, which is in the words and figures as follows :

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

| | |
|--------------------------------------|------------|
| MARCUS A. SPURR, Plaintiff in Error, | } No. 502. |
| <i>vs.</i> | |
| UNITED STATES, Defendant in Error. | |

Error to the circuit court of the United States for the middle district of Tennessee.

Submitted November 16, 1897 ; decided June 1, 1898.

Before District Judges Barr, Ricks, and Swan.

Three indictments were found against the defendant, each of which contained several counts, for violation of section 5208 of the Revised Statutes, by which it is provided: "It shall be unlawful for any officer, clerk or agent or any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check." By section 13 of the act of Congress, approved July 12, 1882, it is enacted as follows: "That any officer, clerk or agent or any national banking association who shall willfully violate the provisions of an act entitled: 'An act in reference to certifying checks by national banks,' approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount thereof shall have been

106 regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court." The three indictments found against the defendant were consolidated and tried together. The several counts of the indictments *mutatis mutandis* charge that: "He, the said Marcus A. Spurr, being then an officer, to wit, the president of said the Commercial national bank, did willfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, willfully, unlawfully and knowingly certify a check drawn upon said the Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew not having at said time on deposit with the said the Commercial national bank, an amount of money equal to the amount specified in said check, etc." The sev-

eral counts of the consolidated indictments charged the certification by defendant of four checks drawn by Dobbins & Dazey, between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial national bank, of Nashville, Tennessee, aggregating \$95,641.95. The total amount of checks of Dobbins & Dazey certified by defendant, between said dates, was \$110,366.54.

The Commercial national bank was organized in 1884. Defendant was president, and F. Porterfield was cashier from its organization to its failure, March 25, 1893. The original capital stock of the bank was \$200,000, which was increased from time to time to \$500,000. The firm of Dobbins & Dazey was engaged in the purchase, sale and exportation of cotton. Its financial standing and credit was excellent, but its assets consisted only of money, choses in action and cotton on hand and in transit. On December 9, 1892, at the close of business, the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of \$64,417.97, and on that date the defendant certified that firm's check for \$15,000. At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of \$51,070.65, and on that day their check for \$31,000 was certified by defendant. At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn \$77,515.59, and at the close of business the next day, \$38,125.84, on which day defendant certified their check for \$40,000. At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account \$49,454.59 (February 12th was a holiday), and at the close of business February 13, 1893, their account was overdrawn \$68,243.73. On that day defendant certified their check for \$9,641.95. The evidence on the part of the Government tended to show that the account of Dobbins & Dazey was continuously and largely overdrawn upon the individual ledger during the period covered by the checks certified by defendant (except one day in January, 1893, when there was a small credit balance), and that this fact was known to Porterfield, the cashier, and all the employes of the bank under him in authority.

The board of directors of the bank consisted of twenty-one members. It had two standing committees, known as the executive committee (of which defendant was a member), whose duties were prescribed by by-law 17, and an examining committee, with the powers and duties prescribed by by-law 28.

By-law 17 empowered the executive committee to discount and purchase bills, notes and other evidences of debt, and to buy and sell bills of exchange, and required them to report at each regular meeting of the board of directors all bills, notes and other evidences of debt purchased by them since their last regular report. By-law 28 made it the duty of the examining committee to examine, four times a year, or oftener, the affairs of the bank, count its cash, compare the assets with the accounts of the general ledger and ascertain if these and all other accounts were correctly kept, and whether the bank's condition corresponded therewith, and whether the bank was in a sound and solvent condition, etc., and report the result of their

examination at the next regular meeting of the board. Under by-law 8, the cashier was primarily responsible for all funds, property and valuables of the bank. Under by-law 9, the president was responsible only for such funds, property and valuables of the bank which should come into his hands as president.

Both officers were required under these by-laws, respectively, to give security for the faithful and honest discharge of their respective duties. By-law 19 provided: "That no officer or clerk of this bank shall pay any check drawn upon it or pay out money on any order unless the drawer of such check or order shall, at the time of
108 the presentation thereof, have deposited in the bank, sufficient funds to meet such check or order."

There was evidence tending to show that defendant had access to the books of the bank, and that he frequently made inquiries of the clerks and book-keepers concerning various matters and accounts. The only direct testimony that defendant was informed of the state of that account, at the dates of the certifications, was that of Porterfield, the cashier, who testified that between November 25, 1892, and the failure of the bank, March 25, '93, he apprised defendant that Dobbins & Dazey's account was continuously and largely overdrawn. Evidence was also received—as indicating defendant's knowledge of the state of Dobbins & Dazey's account—that defendant and Porterfield, the cashier, were each engaged in speculation in cotton futures through Dobbins & Dazey during the period covered by the dates of the checks certified by defendant, and that Porterfield was so engaged without furnishing any margins, and that the funds of the bank were used by Dobbins & Dazey in such speculations without the knowledge of defendant. The evidence upon these points was conflicting. Defendant was also sworn as a witness in his own behalf.

For the purpose of establishing defendant's knowledge and intent, evidence was admitted to show that in 1886 and 1887, Porterfield, with defendant's knowledge, but without the consent or knowledge of the bank, its directors or committee, used a large amount of the funds and moneys of the bank in the purchase on speculation of stocks for the joint account of himself and defendant, and other persons, in the name of the bank or in his (Porterfield's) name as cashier. For the same purpose, evidence was also admitted bearing on two other accounts, one opened March 12, 1889, with Herzfeld & Co., New York city, in the name of "Frank Porterfield," separate, and the other opened October 3, 1889, with Latham, Alexander & Co. of New York city, in the name of Porterfield & Spurr, both of which were continued down to the close of the bank in 1893, and that the defendant and Porterfield were jointly interested in the speculations indicated by those accounts during the entire period of their existence; that numerous purchases and sales of stocks, bonds and other funds were made by them for their joint benefit on those accounts, and that large sums of the moneys and funds of the bank were used by Porterfield without securing or reimbursing the bank in such purchases, with the knowledge and consent of defendant after the accounts had been running some time, (not when

they were opened.) There was also evidence that defendant and another director objected to opening an account with Dobbins & Dazey, on the ground that their business was understood to be large and would require the bank to provide cash to meet the checks of the firm on eastern drafts, secured by bills of lading for cotton, and the bank might not always be able to provide sufficient funds to carry the account. Dudley, the director who shared Spurr's objections to receiving the account, had been in the cotton business, and stated at the directors' meeting that Dobbins & Dazey would be likely to overdraw their account; that when the account was accepted, the cashier was instructed by the committee in defendant's presence not to allow Dobbins & Dazey to overdraw their account, nor to borrow more than their line of credit, which was \$30,000, and not to discount their drafts without bills of lading attached; and the cashier promised obedience to the order and reported to Dudley several times that the account was profitable and satisfactory; that the committee understood and believed that the cashier was obeying his instructions; that the members of both committees and the directors had no information, before March 25, 1893, that Dobbins & Dazey's account was overdrawn, or that they were depositing and discounting or had deposited or discounted, eastern drafts, without bills of lading attached; that the directors and committee did not regard it as their duty to examine depositors' ledger accounts or the drafts deposited by them; that prior to and during the period covered by the dates of the checks certified by defendant Dazey, one of the firm of Dobbins & Dazey, was conducting a system of what is known among bankers as "kiting" between Nashville and New York; that is, he would draw in the firm name large drafts on John Moore & Co., and Latham, Alexander & Co., bankers and brokers, the New York correspondents of Dobbins & Dazey, and deposit and discount such drafts without bills of lading attached, and take credit for the proceeds as cash on the account of Dobbins & Dazey in one or the other of the two banks of Nashville, in which they carried regular accounts, viz, the Commercial national bank or the First national bank; Dazey would then draw in his firm's name checks on one of these banks, generally in favor of the Fourth National Bank of Nashville, but sometimes on another bank. These checks were then certified by the Commercial national bank or the First national bank, whereupon the Fourth national or the American national bank would transmit to New York, by wire, the money to meet Dobbins & Dazey's drafts maturing in New York, and the latter banks would collect the amount of the checks from the Commercial national or the First national bank, as the case might be. Dazey would then draw another set of drafts in Dobbins & Dazey's name, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial national or First national bank. He would then draw a second set of checks on the Commercial national bank or the First national bank in favor of the Fourth national bank or the American national bank, and these would be certified by the Commercial or the First national bank. The Fourth national

bank or the American national bank would transmit the necessary amount by wire to New York to meet the second set of drafts, and would again reimburse themselves by collecting the several sets of checks from the certifying banks. When these drafts were drawn by Dazey, his firm was largely overdrawn with the drawees. This process was repeated again and again for nearly six months preceding the failure of the Commercial national bank, during which time said bank received and entered as cash Dobbins & Dazey's drafts for \$1,829,427.25, which had no bills of lading attached, and at the bank's failure, March 28, 1893, it had on hand Dobbins & Dazey's drafts of this kind to the amount of \$142,000, which had been discounted and credited to the drawers by the Commercial national bank, February 27, 1893.

The jury found the defendant guilty upon certain counts of the consolidated indictments. Motions in arrest of judgment and for a new trial were overruled and the defendant was sentenced to be imprisoned for two years and six months upon three counts of the consolidated indictments, based on the checks certified by the defendant, January 3, 1893. To reverse this judgment, the defendant brought this writ of error.

SWAN, district judge, delivered the opinion of the court:

The errors assigned and relied upon are nineteen in number. Some of these present questions dependent upon the same principles as others and will not be separately discussed.

The first assignment is predicated upon the following excerpt from the charge of the court, viz: It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty, you may draw an inference of fact
111 that he did so inform himself; if he did not already know it.

But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not in fact acquire information of the truth." In the next sentence of the charge, the jury were instructed: "And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he was not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith, would not render him guilty."

The learned judge had previously instructed the jury that the checks had become the obligations of the Commercial national bank solely by defendant's certification. The facts of certification by defendant, as president, and that Dobbins & Dazey had no funds in the bank at the times of the certification, were admitted. The only question of fact, therefore, left for determination, it is admitted, were the defendant's knowledge of the state of Dobbins & Dazey's account when the checks were certified, and his purpose or intent in the certifications. The instruction criticised did not inform the jury that the effect of the legal presumption was to shift the burden of proof to defendant to negative the inference of fact, but was permissive merely and left the jury free to determine, upon all the evidence in

the case, whether, notwithstanding the inference derivable from the existence of the duty, the defendant had that knowledge of the account, which the court, elsewhere in its charge, made a necessary element of the offense. Defendant's legal duty, as an officer of the bank, to be informed, was *prima facie* evidence of his performance of that duty.

Knickerbocker Life Ins. Co. v. Pendleton, 115 U. S., 339, 347.
Finn v. Brown, 142 U. S., 71.

This was all the effect given it by the instruction in question. The case of Agnew v. The United States, 165 U. S., 36, 49, approved an instruction that an inference or presumption of an unlawful intent throws the burden of proof on defendant.

There was other evidence, direct and circumstantial, tending to show that defendant knew or had reason to believe, at the times of certification of the checks, that the account of Dobbins & Dazey was largely overdrawn. The case, therefore, was not committed to the jury solely upon the inference predicated upon defendant's official position that he had discharged the duty it devolved upon him before the acts of certification; but the jury were explicitly
112 instructed that the Government must establish the defendant's knowledge of the state of the Dobbins & Dazey account beyond a reasonable doubt, in order to maintain any of the counts in the indictment. Nor did the last sentence of the charge covered by this assignment put upon defendant the disproof of knowledge of the account in question. Referring to the inference of knowledge, the court added: "But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth." This certainly deprived that presumption of any controlling influence, in the minds of the jury, against the defendant, and emphasized its rebuttable nature. But even if a hypercritical construction, adverse to the defendant, could be extracted from this passage of the charge standing by itself, it is manifest that its connection with other parts of the charge clearly negatives any argument based upon this isolated sentence.

II. The modification of defendant's third, and the refusal of his seventh request for instructions, were justified by the fact that both were pervaded by the common error that they singled out particular circumstances, omitted all reference to others of importance, and sought to confine the jury to the matters narrated, thus excluding other evidence which the jury might have deemed important. Both were calculated to mislead the jury, and were argumentative.

Grand Trunk R'y v. Ives, 144 U. S., 433.

Rio Grande R'y v. Look, 163 U. S., 280.

Agnew v. U. S., 165 U. S., 51.

Catts v. Phalen, 2 How., 382.

III. The fourth request of defendant was properly refused. It not only prayed for an instruction on the weight of conflicting evidence, but also for a direction to the jury to disregard presumptive

proof on the assumption that it was rebutted by other matters of fact. It was no part of the duty of the court to decide upon the relative force of the facts.

Crane v. Morris, lessee, 6 Peters, 598, 616-'17.

Lilienthel's Tobacco Co. v. U. S., 97 U. S., 237, 268.

Kelly v. Jackson, 6 Peters, 622.

IV. The refusals of the defendant's sixth and ninth requests were also proper. Both were fully covered by the charge given. The court instructed the jury: "The Government is bound, in order to maintain any of the counts in the indictment, to prove * * *

3d: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them (the checks)."

113 Again: "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment before you will be warranted in convicting him." * * * "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not." The remainder of the sixth request was also fully covered by the following passages in the charge: "Knowledge of the defendant of the state of Dobbins & Dazey's account, when he certified the checks, is thus made the pivotal question in the case. Upon this question of knowledge, the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey, from an actual examination of the books of the bank or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry for the reason that he knew of the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds to meet their checks, and that there was no warrant for marking the checks good, that was sufficient." This correctly states the law. The Government was not bound to show defendant "actually knew" that Dobbins & Dazey had no funds in the bank. The judge further said: "And, in general, if the defendant acted in good faith in making these certifications, believing that the state of account of the Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him

guilty." Again: "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the
114 indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith—these words mean substantially the same thing—shut his eyes to the facts and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

4. The modification of defendant's 2d request affords no just cause of complaint. The request recited the respective duties of the president and cashier of the bank as apportioned under by-laws 8 and 9, and the jury were instructed, as prayed, "these two by-laws taken together mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank that may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties." The court then added: "But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, * * * to certify checks; and when the president assumes to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn." Without this modification, the instruction prayed would have been misleading, and would have given the jury to understand that by-laws 8 and 9 alone were the measure of defendant's official duty in dealing with the funds of the bank by certification of checks, and that under those the primary responsibility of the cashier for such funds and property, would relieve the defendant, as president, from civil and criminal responsibility under Revised Statutes, section 5008 and section 13 of the act of July 12, 1882. These statutes, by necessary implication, impose upon the certifying officer the duty of knowledge of the state of the account before certification of checks drawn upon it. This duty could not be abrogated by by-laws of the bank, or any division of duties between its officers. Nor was it the purpose of these by-laws to exempt the president, when he assumed to certify checks, from the statutory duty of knowledge. This is evident from the bank's by-law No. 19, which provided that, "no officer or clerk of this bank shall pay any check drawn upon it or pay out money
on any order unless the drawer of such check or order shall,
115 at the time of the presentation thereof, have deposited in the bank funds sufficient to meet such check or order." By-laws 8 and 9 were, perhaps, properly called to the attention of the jury for their bearing upon the question of the intent with which defendant acted in the certifications.

Potter vs. U. S., 155 U. S., 447.

There is no substantial difference between the requirements of

these by-laws and the duties imposed by the statute and defendant's official oath required by section 5147, United States Revised Statutes. The defendant certainly could not complain that the adoption from the language of the request of the phrase "faithful and honest discharge of his duties" by the court was an expression of opinion on the facts. If it were, it would not have been an error, as the facts were left to the decision of the jury.

Simmons v. U. S., 142 U. S., 148.

Allis v. U. S., 155 U. S., 123.

VI. The court instructed the jury: "The Government is bound, in order to maintain any of the counts in this indictment, to prove, 1st: That the defendant certified the check; 2d: That the drawers of the check had not sufficient funds in the bank to meet such check; 3d: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on." It is argued that the jury were thus informed that the establishment of these three facts—the first two of which were conceded—would authorize conviction. This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanied the act of certification, but the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge and intent. The court was not bound to adopt the language of the request.

Indianapolis R. R. Co. v. Horst, 93 U. S., 295.

Tucker v. U. S., 164 U. S., 164, 170.

Assignments 7 and 9. The 7th and 9th assignments are based upon defendant's 5th, and part of defendant's 7th request for instruction. The former was, in substance, that if the jury found that the account of Dobbins & Dazey, upon the books of the bank, 116 was overdrawn continuously during the period covered by the checks certified, and that the defendant certified the checks in ignorance of such overdraft, "believing at the time that the exchange deposited by Dobbins & Dazey, on the days on which such checks were certified, was sufficient to cover the amount of such checks (besides the overdraft then existing), then he is not guilty, and you should acquit him unless such ignorance was willful, as elsewhere explained in the court's instructions." The modification criticised consisted in adding the words inclosed in brackets. The subject had been fully treated in the charge, and the request should have been refused. Without the modification, it is clear that the instruction prayed would, if granted, have given the jury to understand that it was not necessary for defendant to have ascertained the state of the Dobbins & Dazey account before certifying the check, but it would be sufficient *per se* to acquit him if he be-

lieved that the amount of the exchange deposited—inclusive, necessarily, of the Kiting and other drafts made by that firm upon overdrawn accounts without bills of lading attached—equaled the checks certified. This would have been indirect conflict with that part of the charge presented by the first assignment, which we have approved, and would have nullified the statute which prohibits certification of checks “before the amount thereof shall have been regularly entered to the credit of the drawer upon the books of the banking association.” The purpose of the modification was to preclude such a misconception of the defendant’s duty, and to bring the request into harmony with the statute and the general charge definitive of that duty: The only lawful basis for certification is that prescribed by the statute, and the utmost effect that can be ascribed to the instruction as amended, was, that it required the defendant to act upon the state of the account, not merely upon his belief in the amount of the exchange deposited, leaving the jury free, however, under the general charge, to determine the intent with which the defendant acted. The pith of the instruction, as thus modified, was so fully covered by the extracts from the charge given in the examination of the 1st, 4th and 10th assignments of error, as to leave the defendant no ground of complaint against the amendment.

The court adopted part of defendant’s 7th request, after modifying it so that it read: “If you find that in each instance, when he certified a check, the defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank to
117 cover the checks certified (I add: In addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him.” The qualification of this request complained of is in the words in brackets. The reasons stated in the consideration of the 7th assignment of error approve the action of the court in making the same addition to this part of the charge.

Assignment 11. The eleventh assignment of error has nothing to sustain it. The jury returned into court after receiving the charge and asked the following question: “We want the law as to the certification of checks when no money appeared to the credit of the drawer.” The court in response read the first paragraph of section 5208 of United States Revised Statutes, and asked the jury if that answered their question. The foreman responded “Yes.” The court then read said paragraph a second time, remarking: “I read it again that you may all understand it.” This action was excepted to on the ground that the court failed to read and explain section 13 of the act of July 12, 1882, imposing the penalty for the willful false certification of checks. The argument in support of this exception assumes that “what the jury wanted to know was the law applicable to this case * * * the law applicable to the criminal false certification” and therefore the court should have read section 13 of the act of July 12, 1882. It is also urged that the court gave the jury to understand that the certification of a check when there were no funds in bank to meet it, was sufficient to sus-

tain the indictment. The assumption is negatived by the answer of the jury. The court charged that to warrant conviction, the certification must have been willfully made, not merely false in fact. That distinction was emphasized in the following extract from the charge: "The question remains for you to settle upon all the evidence whether the defendant, Spurr, in certifying these checks acted in good faith and without any intent to do that which the law forbids, and which he must be presumed to know was unlawful, namely, the certifying of a check as good when the maker of it had no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the banks to pay them, he should be acquitted. If he certified the checks either knowing that the funds to respond were not in the bank, and that the making of the check was unwarranted or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable
118 doubt." This was a full and fair exposition of the disputed elements of the offense charged. Other parts of the charge were equally explicit to the same effect, as we have shown elsewhere.

Assignment 12. Error is assigned on the admission of evidence of the stock transactions had through the bank or Porterfield as cashier, in 1886 and 1887. This was received "for its bearing upon the right of Spurr to rely upon Porterfield's representations upon the question of fact—whether he did rely upon any assumed correctness or honesty of action." Upon this question the Government offered evidence of purchases and sales of stock on the New York exchange, through certain brokers and dealers in stocks in New York in the name of Porterfield, cashier of the Commercial national bank, for the account of sundry customers of said bank, as well as Porterfield, R. S. Cowen, assistant cashier of said bank and defendant. These purchases and sales were made with funds of the bank remitted to New York by Porterfield, and embraced transactions from February 18, 1886, to January 15, 1887, both inclusive. The amount of the bank's money remitted by Porterfield to be used as margins in these transactions was over \$66,000. The profits accruing to defendant from these ventures were credited to him on the books of the Commercial national bank at the times of the sales and afterwards were credited on his pass book and drawn out by him. There was also evidence that defendant accounted for the exact amount of losses shown upon the accounts, statements, tickets, slips and memoranda made out by Porterfield in reference to said transactions, and gave his notes to the bank with collateral security for his share of the losses but defendant never informed the executive committee of the bank or its directors that these notes were given to cover losses on stock speculations. There was evidence that the funds of the bank were thus used by the cashier with defendant's knowledge, but without that of the directors or committees of the bank. The evidence relied upon to show defendant's intent in certification of Dobbins & Dazey's checks was largely circumstantial. In such cases, a broad range of inquiry is permitted and when the

evidence tends even remotely to establish the ultimate fact, its admission will not be ground for reversal.

Clune v. U. S., 159 U. S., 593.

Alexander v. U. S., 138 U. S., 353.

Evidence of similar transactions to illustrate the character of the act in question has repeatedly been held competent in both
119 criminal and civil cases, and is often the only method of establishing the intent with which they were done.

Allis v. U. S., 155 U. S., 119.

Wood v. U. S., 16 Peters, 342.

U. S. v. Wood, 14 Peters, 230.

Taylor v. U. S., 3 How., 197-208.

Mudsill Mining Co. v. Watrous, 61 F. R., 163-179.

The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission, is largely discretionary with the court.

Moore v. U. S., 150 U. S., 60.

In *United States v. 36 Barrels of High Wines*, 12 Int. Rev. Rec., 40-'1, Judge Woodruff said that for the purpose of showing the *quo animo* of an act under inquiry, he would not hesitate to admit evidence of acts running back to the enactment of the internal-revenue law, which had then been passed fully five years. Similar evidence was received in *Coffin v. United States*, 162 U. S., 67, for the same purpose. It is every day's practice to admit proof of this character to show intent on the trial of persons charged with counterfeiting. The evidence was properly received and its purpose carefully defined and limited in the charge of the court in accordance with the case last cited.

Assignments 13 and 14. The instruction which is the subject of this assignment and the refusal of defendant's thirteenth request, may be considered together. The first declared and the second conceded the illegality of speculation by a national bank or its officers in stocks and bonds upon margins. This was correct. *The First National Bank v. The National Exchange Bank*, 92 U. S., 128; *California Bank v. Kennedy*, 167 U. S., 362, 367. The court then told the jury that if Porterfield with Spurr's knowledge, was engaged in misusing the bank's funds and credits on cotton and stock exchanges in his own or the interest of others "the jury were at liberty to find in that a reason why Mr. Spurr should not have confidence in Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." We perceive nothing erroneous in this.

Preston v. Prather, 137 U. S., 605.

120 The request refused, would, if granted, have practically directed the jury that the confessedly illegal practices of the national banks of the city in receiving and executing orders for the purchase and sale of stocks and bonds on margins, if profitable, the receipt by stockholders of profits therefrom and the opinions of individuals engaged in like speculations, provided defendant had no reason to suspect the cashier of dishonesty in the conduct of such transactions and secured the bank against loss from the execution of his orders for such prohibited purchases and sales, could not and ought not to be given any weight against defendant, although the Commercial national bank did such business. This proposition is entirely untenable and is irreconcilable with the admission in evidence of those transactions which we have just approved. The evidence of the manner in which the defendant dealt or permitted others to deal with the funds of the bank having been properly admitted, its weight and effect was a question for the jury and not one of law for the court.

Assignment 15. The modification of defendant's tenth request was necessary to prevent the misleading of the jury. The court, at defendant's request, had told the jury in substance that if defendant certified the checks in good faith and honest reliance on the cashier's statement as to the Dobbins & Dazey account, his certifications would not be criminal. This followed immediately the clause modified, which read as presented "and if the cashier was reputed to be and believed by the defendant to be a man of honesty and truth, the defendant would have a right to rely upon his statements in regard to that account (Dobbins & Dazey's)." The court struck out the word "truth" and substituted therefor the words "right conduct as respects the affairs of the bank," and with this amendment granted the request. Whether or not defendant had a right to rely or in fact relied in good faith upon Porterfield's statements in reference to that account, was a question of fact to be determined, not alone by the cashier's reputation or by defendant's professed belief in his general truthfulness, but from all facts and circumstances known to defendant tending to approve or discredit the *bona fides* of his confidence in Porterfield's official conduct. Defendant was not prejudiced by this amendment, especially as the general charge covered the subject fully.

Assignment 16. The eleventh request to the effect that unless defendant knew or had reason to believe that the cashier "was
121 despoiling the bank and using its funds instead of his own" in his dealings in stocks and bonds and cotton futures, the fact that defendant knew that the cashier had dealt in those commodities, "would not deprive the defendant of the right to rely on his statements in respect to the affairs of the bank," was substantially granted, after substituting for the phrase "so despoiling the bank and using its funds" the words "had been using the funds or credits of the bank." There is no merit in the objection made to this change. It is mere verbal criticism. The substitution of the words "unlawfully in respect to its affairs" in place of the word "dishonestly" in the last paragraph of the request, making it read

"in order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew the cashier was unfaithful to the bank and acted unlawfully in respect to its affairs," fully preserved the rights of defendant and was an impartial reference to all the evidence of defendant's knowledge of the cashier's transactions. The amendment was a synonym in substance of the adverb it displaced. The cashier could not have acted "dishonestly" without acting "unlawfully" in respect to the bank's affairs. This request was also so fully covered by defendant's twelfth request which was granted, that it might correctly have been refused in toto.

Assignment 17. There is nothing in this assignment by which the accounts whose admission is alleged is error, can be identified. They are mentioned as "said accounts," without further description. If we assume the reference to be made to the accounts of Herzfeld & Co. with "Frank Porterfield, separate," and that of Latham, Alexander & Co., with Porterfield and Spurr—and this is the theory of counsel for plaintiff in error—they were plainly competent under the same rule of evidence which sanctions the admissibility of the transactions had with Kohn, Pepper & Co., De Neufville & Co., and Latham, Alexander & Co., discussed in the examination of defendant's 12th assignment.

Assignment 18. Defendant's 14th request was rightly denied, because fully covered by the instruction given in response to defendant's 12th request.

Assignment 19. The questions arising under this assignment are presented as if it involved the right of a defendant in a criminal case to give in evidence, his character for truth and veracity. It complains of "the exclusion of the evidence of John Overton and other witnesses offered by defendant; first, as to defendant's good character for truth and veracity; and, secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville." * * * After defendant had testified, his counsel claimed that his testimony had been impeached by the cross-examination, and offered testimony to his good character for truth and veracity and honesty and integrity during the entire period of his residence in Nashville, down to the time of the trial. The court limited the inquiry into defendant's general character to the time of the failure of the bank, reserving for further consideration his right to adduce evidence of his character for truth and veracity. To this ruling the defendant duly excepted. The Government "admitted defendant's good character for honesty and integrity down to the period of the charge." Whereupon, the court limited defendant to ten witnesses upon that point, and that number was examined under the above limitation as to time. The correctness of that limitation is the first inquiry. The reasons assigned by the learned judge for restricting the evidence of defendant's reputation for honesty and integrity to the time of the bank's failure, meet our approval. He said: "If we were to bring the time down to the present, it would be liable to embarrass the jury and turn their minds from the real merits of the case, and

put before them opinions which ought to be kept as far from the jury as possible. * * * We would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present." * * * The authorities support this ruling.

State v. Marks, 51 Pac. Rep., 1090.

State v. Kinley, 43 Iowa, 296.

Wroe v. The State, 20 Ohio St., 401, 472.

White v. The State, 111 Ala., 92.

The question raised by the second branch of this assignment was rightly decided. The ground on which the offer of evidence as to defendant's character for truth and veracity was based and is here urged, was, "that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely." No testimony was introduced by the Government attacking defendant's character for truth and veracity, nor was any evidence offered in rebuttal by the Government. A careful reading of defendant's cross-examination fails to disclose any ground for the admission of evidence of his general reputation for truth and veracity. The fact that contradictions exist between his testimony and that of other witnesses affords no ground for its admission.

1 Greenleaf on Evidence, sec. 469.

In his character as a witness, defendant is not entitled to any privilege not extended to other witnesses.

Reagan v. U. S., 157 U. S., 301, 305.

U. S. v. Hollis, 43 F. R., 248.

In general, where no attempt has been made to impeach him by evidence of bad character, or of contradictory statements, or by the cross-examination, he cannot corroborate his testimony or give it weight by evidence of his general reputation for truthfulness—nor will his own view of the effect of his cross-examination make such testimony competent. The rule as to the admissibility of evidence of character is thus broadly stated by Greenleaf (1 Gr. on Ev., sec. 54)—"And in all cases where evidence is admitted touching the general character of the party, it ought manifestly to bear reference to the nature of the charge against him." The evidence offered was manifestly intended to give weight to the defendant's personal testimony—not for the purpose of establishing a general character inconsistent with the offense charged. The weight of reasoning and authority justified its exclusion.

Stevenson v. Genning, 64 Vermont, 609.

Funderberg v. The State, 100 Ala., 36, 37; (14 South Rep., 877)

Tendens v. Schumers, 112 Ill., 266, 267.

People v. Cowgill, 93 Cal., 597.

A careful examination of the record satisfies us that the defendant has had a fair trial, and that both in the rulings upon evidence and in the submission of the case to the jury, his rights were carefully protected. The judgment of the circuit court for the middle district of Tennessee is therefore affirmed.

124 And afterwards, to wit, on July 1st, 1898, a petition for rehearing was filed in said cause, which reads and is as follows:

Petition for Rehearing.

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error, }
vs.
 UNITED STATES, Defendant in Error. }

Petition to rehear.

To the honorable the judges of the United States circuit court of appeals, sitting at Cincinnati, in the State of Ohio:

Petitioner, Marcus A. Spurr, the above-named plaintiff in error, respectfully petitions the honorable court for a rehearing of this cause, and says:

I.

He is advised there is error in the opinion of the honorable court on pages 6, 7 and 8, in disposing of the first assignment of error; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

II.

He is advised there is also error in the opinion of the honorable court on page 8, in approving the refusal by the circuit court of the seventh request for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

III.

He is advised there is also error in the opinion of the honorable court on page 8, in approving the refusal by the circuit court of the fourth request for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

IV.

He is advised there is also error in the opinion of the honorable court on pages 8 to 11, in approving the refusal by the circuit court of the sixth and ninth requests for special instructions, and the modification of the second request; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

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V.

He is advised there is also error in the opinion of the honorable court on page 11, in overruling the sixth assignment of error, upon the clause of the charge stating the three facts necessary to be proven; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

VI.

He is advised there is also error in the opinion of the honorable court on pages 11 and 12, in overruling the seventh and ninth assignments of error, based upon the modification of the fifth and part of the seventh requests for special instructions; and the grounds thereof are fully stated — the brief of counsel hereto annexed.

VII.

He is advised there is also error in the opinion of the honorable court on page 13, in overruling the eleventh assignment of error, based upon the action of the circuit court upon the request of the jury for further instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

VIII.

He is advised there is also error in the opinion of the honorable court on pages 13 to 15, in overruling the twelfth assignment of error, upon the admission of the stock transactions of 1886 and 1887; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

IX.

He is advised there is also error in the opinion of the honorable court on pages 15, 16 and 17, overruling the thirteenth, fourteenth, fifteenth and sixteenth assignments of error, based upon the charge as to effect upon petitioner of Porterfield's dealing in stocks, and the refusal of the thirteenth and fourteenth, and the modification of the tenth and eleventh, requests for special instructions; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

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X.

He is advised there is also error in the opinion of the honorable court on pages 17 to 19, overruling the nineteenth assignment of error, based upon the exclusion of evidence of petitioner's good character for truth and veracity; and the grounds thereof are fully stated in the brief of counsel hereto annexed.

Petitioner makes part hereof the annexed brief of counsel, and asks that it be so treated. He prays that the honorable court will rehear and reconsider this cause; and that the judgment of affirm-

ance herein entered may be vacated and recalled, and the said judgment of the circuit court reversed and a new trial awarded.

MARCUS A. SPURR, *Petitioner.*

PITTS & MEEKS,
BAILEY P. WAGGENER,
Attorneys for Petitioner.

STATE OF TENNESSEE,
County of Davidson, Middle District of Tennessee. }

Marcus A. Spurr, being duly sworn, deposes and says: I am the above named petitioner. The foregoing petition is true to the best of my belief, and is not filed for delay, but that justice may be done.

MARCUS A. SPURR.

Sworn to and subscribed before me, this June 30, 1898.

H. M. DOAK,
Clerk U. S. Circuit Court, Middle Dist. Tenn.

I hereby certify that I am of counsel for above-named petitioner, and that the foregoing petition is, in my opinion, well founded in point of law.

JOHN A. PITTS,
Of Counsel for Petitioner.

Brief of Counsel.

The paragraph numbers in the foregoing petition will be followed in this brief:

I.

The ruling of the court on pages 6, 7 and 8, of the opinion, disposing of the first assignment of error, is based upon the rule in civil cases, which does not obtain as to crimes. The cases cited from, 115 U. S., 339, 347, and 142 U. S., 71, are both civil cases, involving civil liability only.

The case of *Agnew vs. The United States*, 165 U. S., 33, 49, also cited by the honorable court, does not support the conclusion of the court in this case. The trial court, in that case, in the opening part of the instruction complained of, had said to the jury: "The rule of law in regard to intent is that intent to defraud is to be inferred from willfully and knowingly doing that which is illegal, and which, in its necessary consequences and results, must injure another." The trial court then, in the instruction, specified the alleged fraudulent acts, which were the placing of worthless securities in the bank and taking credit for them, of course, as the court had previously said, knowing them to be worthless, and told the jury that they must necessarily infer from such acts, thus willfully and knowingly done, if they found they were done, that the intent was fraudulent. The Supreme Court, in commenting upon this instruction (p. 50), said: "This was an application of the presumption that a person intends the natural and probable consequences

of acts intentionally done, and that an unlawful act implies an unlawful intent." The learned court cites 1 Greenleaf on Ev., sec. 18; 3 Greenleaf on Ev., secs. 13 and 14; Jones on Ev., sec. 23, and Bish. Cr. Prac., secs. 1100, 1101. These authorities apply the presumption only to acts knowingly and intentionally done; and to emphasize the view upon which we insist, Mr. Greenleaf, in section 13, of volume 3, quoting from Lord Mansfield in *Rex vs. Woodfall*, says: "Therefore, where an act, in itself indifferent, becomes criminal if done with a particular intent, there the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies on the defendant; and in failure thereof the law implies a criminal intent."

The act of July 12, 1882, under which petitioner is indicted, makes it a misdemeanor to "willfully" violate the provisions of section 5208, Revised Statutes. The word "willfully" in this statute, as held in *Potter vs. United States*, 155 U. S., 446, "implies on the part of the officer knowledge and a purpose to do wrong." This is the language of the court, and the court adds, in the same connection: "Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law."

128 It seems apparent that the certification of a check made in excess of the deposit, nothing more being shown, is an act "in itself indifferent," as Mr. Greenleaf says in the section above quoted from, and only becomes criminal when "willfully" done; that is to say, when done with knowledge and a purpose to do wrong." Without this knowledge and purpose, the act is not a crime. In such case, according to Mr. Greenleaf, and, we submit, all the other authorities as well, the knowledge and purpose, or intent, are as essential parts of the crime to be proven before a *prima facie* case is made out as the act itself.

If the act of July 12, 1882, had said it should be a misdemeanor to violate the provisions of sec. 5208, Revised Statutes, omitting the word "willfully," it might be said that proof of the mere doing of the forbidden act would make out the case *prima facie*, and imply the necessary criminal knowledge and intent. But the law is not thus written. The act is criminal only when "willfully" done. The thing to be proven before any criminal intent can be inferred is, not that there has been a false certification when the drawer's account was overdrawn, but that there has been a willfully false certification—a certification with knowledge of the overdraft or want of funds, and a purpose to do wrong, a bad intent. But in this case the circuit judge told the jury that an essential part of the crime to be proven, namely, his guilty knowledge of the circumstances of his act, without which the act was not criminal at all, might be inferred from his duty to know those circumstances.

The holding of the court, we submit, is violative of the principles declared by the supreme court in the *Potter* case, in the great case of the Directors of the City of Glasgow Bank, and in numerous other cases cited in the argument at the trial.

II.

The ruling complained of in this paragraph, as applied to the seventh request for special instructions, it is respectfully submitted, does the petitioner great injustice.

This instruction is found on pages 51 and 52 of the printed record. It put the whole case and theory of petitioner's defense hypothecally and fairly. His theory and defense were not otherwise nor elsewhere fairly put by the court in any part of the charge. It did not attempt to exclude from the consideration of the jury any part of the evidence on either side; but it put the facts which he had attempted to prove in his own behalf, and on which he had relied for acquittal—facts which the record shows were supported by evidence upon which the jury would have
129 been warranted in finding that they were true. And the court was asked to charge the jury that, if they did find that these facts were true, then defendant should be acquitted. Assuming that these facts were true, and were so found by the jury, ought not petitioner to have been acquitted, whatever the Government proof might have been? Under that instruction, all the proof in the case was to be considered, on both sides—none of it was to be excluded or ignored, and the issue was not made to turn upon part of the evidence. The testimony of all the Government's witnesses, and all the circumstances adduced to show knowledge, were to be considered on the question whether petitioner had actual knowledge of the state of the account, and whether he acted honestly and in good faith; for all these questions, under this instruction, must have been found in his favor before the instruction could avail the petitioner. It is true, he could not have been convicted, under this instruction, upon any presumption or inference of knowledge drawn from his duty to know. But this instruction, and the fifth, of a similar character, but briefer, being out of the way, there was nothing left but for the jury to act on that inference and disregard the question of actual proven knowledge.

It is respectfully submitted that none of the cases cited by the honorable court are at all applicable to this instruction.

In *Railway vs. Ives*, 144 U. S., 433, the instruction sought to have the court to say, in substance, that the deceased was guilty of contributory negligence, and could not recover if certain specified facts existed. The court held the instruction improper because, first, the question being contributory negligence, the jury were bound to consider all the facts and circumstances bearing upon that question; and, secondly, because the instruction, so far as it was correct, had already been given, in general terms, in the part of the charge relating to proper care and contributory negligence, and the refusal to give it again, in different language, was not error. Manifestly, the instruction in the present case was not of that kind.

In *Railway vs. Look*, 163 U. S., 280, several instructions had been refused by the trial court, most of them on the ground that they had been given in substance in the general charge. The last one was of precisely the same character as that in 144 U. S., above

noticed, and its refusal was held proper upon the same ground, namely, that it was upon the question of contributory negligence, and sought to make the issue turn upon a few of the many facts in the case bearing upon the question, whereas the jury were
 130 bound to consider all of them—the court citing and quoting from the Ives case in 144 U. S. Manifestly this case is equally inapplicable to the present one.

In *Agnew vs. United States*, 165 U. S., 51, the instruction was held to have been properly refused because, so far as it was correct, it had been substantially already given. Certainly this was not such an instruction as the present.

In *Catts vs. Phalen*, 2 How., 382, the action was for fraud practiced upon the plaintiffs by a young man, their employé, in inducing them to pay a certain lottery ticket. One of the defenses was that the defendant was a minor. The lottery was drawn in December, 1840; but the money was paid in February, 1841. On this question of minority there were two requests for special instructions prayed by the defendant: First, that "if plaintiff paid the amount of said prize under the belief that said ticket had been fairly drawn, the plaintiff cannot recover;" and second, "that if the jury shall believe from the evidence that in December, 1840, when the lottery was drawn, the defendant was an infant, the plaintiffs are not entitled to recover in this action." The Supreme Court held the first properly refused because it ignored the fact, which was in evidence that the plaintiff's belief was caused by the false and fraudulent assertions of the defendant. The second was held properly refused because, first, it restricted the question of minority to December, 1840, when the lottery was drawn, and ignored the period of February, 1841, when the money was paid; and, secondly, because the defendant's minority was no defense to an action founded on his fraud and falsehood. The comments of the court upon these instructions are so clearly illustrative of what is a faulty instruction on account of its placing the issue upon only a part of the evidence, that we copy one paragraph, the other being similar:

"The first instruction, if granted, would have excluded from the consideration of the jury all reference to the fraud which produced such belief in the plaintiff, and they must have given it the same effect, whether it was founded in fact, or caused by the false asseveration of the fact by the defendant, knowing it was a falsehood, and thus depriving the jury of the right to decide on the whole evidence."

These are all the cases cited by the honorable court on this question. They do not, we respectfully urge, apply at all to the instruction in question. They show clearly, and this is especially true of the second Howard case, that a partial instruction, such as
 131 the honorable court erroneously conceives our seventh to be, is an instruction which singles out certain facts, and makes the question involved turn upon them, independently of other material facts bearing upon the same question, which, if true, would or might produce a different result. Thus, as in the second Howard case, where the instruction would make the defendant's liability

turn upon the plaintiff's belief of a certain fact, ignoring the other proven and material fact, that that belief was induced by the defendant's fraud. And thus, again, as in the cases in 144 and 163 U. S., where the instruction would make the existence of contributory negligence turn upon certain specified facts, where there are other material facts and circumstances proven bearing on that question, which, if considered, might change the result.

A correct test of the applicability of this rule to our seventh instruction is this: Assuming that the jury should have reached the conclusions stated hypothetically in the instruction, what other fact or facts, not involved in it, was there any evidence tending to establish that could have affected the result?

We believe there was not a syllable of evidence offered by the Government but must necessarily have been considered by the jury in determining the questions submitted in that instruction. The evidence involved was no less than the whole evidence in the case; and, this being so, the instruction was not obnoxious to the rule declared in the cases cited. It has never been insisted that it was covered by the general charge or by any other instruction given; nor that, if the case put by it was found by the jury the petitioner was not entitled to acquittal. It ought, therefore, to have been given.

III.

It is respectfully submitted that the honorable court, in its opinion (p. 8), overlooks the fair and real meaning and purpose of the fourth request for special instructions, and places upon it an entirely erroneous construction. The substance of the instruction, briefly stated, was that, if the jury found that petitioner did not keep the books, did not have charge of the Dobbins & Dazey account, and it was not at any time referred to him or his attention called to it, and that he was assigned to other duties, then no inference of his knowledge of the state of that account should be drawn from the mere fact that the account appeared on the books as overdrawn, for knowledge of the contents of the books could not be imputed to him simply because he was president or director.

132 This was the plain meaning of the instruction, and it was a sound proposition, and ought to have been given. It stated a simple and well-established proposition of law (*Briggs vs. Spaulding*, 141 U. S., 162, 163, and authorities there cited), and did not pray "for an instruction on the weight of conflicting evidence." If this honorable court, by the statement in the opinion that the request called "for a direction to the jury to disregard presumptive proof, on the assumption that it was rebutted by other matters of fact," meant that the purpose was to have the jury disregard any supposed presumptive proof of petitioner's knowledge of the state of the account arising out of the undisputed fact that he was president and director, and the fact that the account on the books was overdrawn, then, it is respectfully urged, the honorable court was in error in holding that the instruction was properly refused. So

interpreted, the instruction should have been given under the law as declared in *Briggs vs. Spaulding*, *ut supra*.

And here, also, the authorities cited by the honorable court are not applicable to the instruction, it is respectfully urged. Three cases are cited. In *Crane vs. Morris*, 6 Pet., 616-17, the question was upon the delivery of a deed. The court was asked to instruct the jury "that in the absence of all proof that the trustees or any person for them, ever had the deed, and there being no proof of a holding under it, the fact that the deed came out of the hands of Morris, in 1787, is sufficient, of itself, to rebut any presumption of a delivery arising from the proof of the deed by William Livingston, or the proof of the handwriting and death of the subscribing witnesses." The court, in holding this instruction properly refused, said:

"This instruction plainly called upon the court to decide mere matters of fact which were in controversy before the jury, and, upon the assumption of such matters of fact, to direct the jury that they rebutted other matters of fact. It was no part of the duty of the court to decide upon the relative weight and force of these facts. They exclusively belonged to the jury, and the instruction was properly refused."

Other instructions of similar kind were disposed of by the court on the same ground, on page 617.

Now, our fourth request did not ask the court to decide that certain specified facts would rebut a certain presumption arising out of other facts; it did not ask the court to decide upon the relative weight and force of any opposing facts or circumstances whatever. On the contrary, it only sought to have the court tell the jury, as a matter of law, generally, that knowledge of the contents of
133 the books of a bank is not imputable to a person simply because he is president or director, and, particularly, that in this case, if petitioner was not the book-keeper, did not have charge of the Dobbins & Dazey account, and it was never referred to him or brought to his attention, the jury ought not to infer his knowledge of its condition "from the mere fact that the account appeared on the books to be overdrawn."

Kelly vs. Jackson, 6 Pet., 622, also cited by this honorable court, was based upon the same title and evidence as the case of *Crane vs. Morris*, and was decided at the same time. Substantially the same instructions were involved in both cases, and were disposed of upon the same grounds and by the same learned judge.

The citation to *Lilienthal's Tobacco vs. United States*, 97 U. S., 237, 268, does not cover any ruling upon refusal of requests for special instructions; but the court, on page 268, citing 1 Whart. Ev., sec. 371, holds that a trial judge, in a civil case, where a presumption of fact exists against a party, may properly instruct the jury that the burden is on such party to remove the presumption, and that, if he does not, the case must go against him on such point—a proposition which has never been questioned in the present case. This, however, does not touch the question presented by petitioner's fourth request.

IV.

The grounds of complaint in the fourth paragraph of the petition are briefly, first, that the court, by the addition shown in the record to the second request, left the jury to infer that petitioner knew the state of the account upon which the checks certified were drawn from the fact of certification and his duty under the by-law, and this, too, without any qualification whatever; second, that the refusal of the sixth request, wherein the defendant's guilt was sought to be determined upon his actual knowledge of the want of funds and his "willful" certification with such knowledge (excluding imputed knowledge, from duty), emphasized the error in the addition to the second request; and, third, that the refusal of the ninth request still further emphasized this error; this request being that petitioner's want of knowledge of the state of the account would be a complete defence unless such want of knowledge proceeded from a will to disobey the law, or from an indifference to its commands, and, furthermore, that this error was not cured by the other portions of the charge quoted by this honorable court in its opinion, on this subject, in view of the instructions elsewhere given by the

134 honorable circuit judge on the subject of petitioner's duty to know, and the evidential consequences of such duty, and on the subject of the necessary elements of a criminal false certification, wherein the court not only failed to use the word "willfully" with reference to false certification, but failed to anywhere properly define a criminal false certification, but told the jury that a false certification "is the certifying by an officer of the bank that a check is good when there are no funds there to meet it."

It is respectfully insisted that the opinion of this honorable court does not give to this action of the trial court the proper weight that it actually bore upon the jury in the trial, to the prejudice of the petitioner.

V.

The sixth assignment of error was upon that part of the charge wherein the court instructed the jury, in substance, that in order to convict, the Government must prove (1) certification by defendant, (2) the want of funds, and (3) defendant's knowledge of the want of funds, adding: "This last element of the offense charged will be explained and its modification stated further on."

Our contention on the argument was that this instruction was erroneous, in that it omitted the element of the offense implied in the use of the word "willfully" in the statute, namely, with bad intent or purpose, and that this omission was not supplied in the promised subsequent instruction. In other words, that the offense consisted in the certification not only with knowledge of the want of funds, but also with bad intent or purpose—a false certification made "willfully;" and that this essential element of the offense was entirely omitted. And it was argued that the offense would not be made out by proving the three things specified in this instruction, but that the Government must go further and show a bad intent, a

bad purpose. This contention, as to the essentials of the offense, the honorable court, on page 11 of the opinion, concedes to be correct. The opinion says:

"This would be true if the instruction had been submitted as complete in itself upon the essentials of the crime, and as dispensing with the necessity of proof of the intent which accompanies the act of certification, but," the opinion adds, "the last paragraph clearly excluded that view of its design and scope."

We readily concede that, so far, the court has most accurately stated the matter on this point. And what, now, is the attitude of the case, according to the opinion, on this instruction up to this point? Obviously, that the instruction gives a definition of the offense, which is defective and erroneous as it stands, unless there is added, in the promised further instruction, a definition or declaration of the intent with which the act was done, superadded to knowledge of the want of funds, and which must be proven, in addition to knowledge of the want of funds. This much, it seems, is very clear. It necessarily follows, that the next step is to inquire whether, in the promised further instructions as to the explanation and modification of "this last element of the offense charged," *i. e.*, knowledge of the want of funds, there is given, as an additional and essential element of the offense, the omitted intent, which must also be proved.

It is in answering this inquiry that we insist this honorable court has committed error, in completely dropping out and overlooking the thing inquired after.

The opinion, referring to this promise of the instruction to state "further on" the explanation and modification of this element of the offense, says: "Its promise was fulfilled in the passages in the charge quoted in our review of the sixth request."

Now let us see if this is true, bearing in mind constantly that what we are looking for is, in some proper and intelligible form, a statement of the intent with which the act must have been done to be criminal, superadded to knowledge of want of funds—the essential part of the offense which this honorable court has conceded was omitted in that part of the charge defining the offense in the first instance, and without which it is erroneous.

The opinion, on pages 8 and 9, in reviewing the sixth request, quotes from the charge as follows:

"You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment before you will be warranted in convicting him."

* * * "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

It is needless to suggest that the statement of the intent, which we are looking for, is not to be found in these extracts.

The only other extract quoted in the opinion reviewing the sixth

request, and which is manifestly the explanation and modification referred to by the learned circuit judge, is as follows:

“Knowledge of the defendant of the state of Dobbins & Dazey’s account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time, or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey’s account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey’s account or the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check, and that there was no warrant for marking the check ‘Good,’ that was sufficient.”

Now, in all fairness and candor, where is there, in any of these quotations from the charge, any statement which cures the conceded defect in the instruction challenged by the sixth assignment of error? Where is there any statement or definition of what this court concedes, in the face of its opinion, was an essential element of the offense which must be proved, the criminal intent?

In truth, as we argued and demonstrated in the original briefs, there is no such statement in any part of the charge, from beginning to end. The court did not admit that idea into the case at all, either in its rulings upon evidence, or upon special instructions, or in any part of the general charge. That error pervades the whole case. The honorable circuit judge, in stating that “this last element of the offense charged will be explained and its modifications stated further on,” had no idea or intention in his mind of adding anything to the burden of the Government with reference to the elements of the offense, but quite the contrary, as his whole conduct of the case, and especially his further explanation of the element of knowledge conclusively demonstrated.

137 Immediately following the definition of the offense, which this honorable court now concedes was erroneous, standing by itself, the learned judge proceeds to give the promised explanation and modification of the third element of the offense. Looking to the full charge, which appears in the back of the brief upon the motion for new trial, and which was, by consent, made part of the record upon the argument at Cincinnati, it will be seen that the court first stated, after laying down these three things necessary to be proven:

"Taking up this evidence in detail, it is not denied that the defendant certified these checks, and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks."

The learned circuit judge then proceeds with his promised explanation and modification, which is quoted above.

Now, it is to be noted, first, that the thing promised "further on" is not an additional fact or element of the offense which the Government must prove, but an explanation and modification of the proof required as to knowledge. Having stated that the certification and want of funds were not denied, but that defendant's knowledge of such want of funds was denied, he begins the promised modification by saying: "The knowledge of the defendant of the state of Dobbins & Dazey's account when he thus certified the checks is thus made the pivotal question in the case." Why pivotal question, if not the only disputed question? It was considered and treated by the judge as the only disputed fact deemed material by him, and as the fact upon proof of which the Government's right to convict depended, as he had stated, the other two essential facts being admitted, or not denied.

His explanation and modification then is, in substance, to relieve the Government of the necessity of proving even this third element of the offense (knowledge) by direct evidence; and to tell the jury that, "if the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn, and refrained from making such inquiry," etc., etc., "that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance," etc., etc., "this would be equivalent to express knowledge. Nor is it necessary to prove that defendant knew just what was the extent of the overdraft," etc., etc. "If he knew of the substance of the fact that Dobbins & Dazey had no funds there," etc., etc., "that was sufficient."

138 Sufficient for what was all this? Undoubtedly, to establish knowledge of the want of funds—the third element of the offense, as originally stated.

Instead of adding to the burden of Government the necessity of proving a criminal intent, superadded to knowledge of the want of funds, the promised modification relieves the Government of the necessity of proving, directly, even that knowledge, and explains to the jury how that fact may be shown indirectly, constructively, and by inference or presumption.

Upon this honorable court's own statement of the law bearing on this question, the case ought to be reversed on this point.

VI.

This paragraph relates to the modification of the fifth and of the latter part of the seventh instruction (which, as a whole, was refused, and has been discussed under paragraph II).

The honorable court, we respectfully submit, has committed two

errors in disposing of these requests. First, in assuming that the indictments in this case are predicated upon that part of the act of July 12, 1882, quoted in the opinion, p. 12, prohibiting certification of checks "before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association." An inspection of the indictments, which are set out in the original transcript of the record on file in the clerk's office, but not in the printed record (see stipulation, page 1 of printed record) will show that they were based upon the first part of section 13 of said act, providing, "That any officer, etc., who shall willfully violate the provisions" of section 5208 of the Revised Statutes, etc., shall be guilty, etc.; and section 5208 makes it unlawful for such person to certify a check unless the drawer "has on deposit with the association" an amount of money equal to the amount of the check, but makes no reference to the amount being "regularly entered to the credit of the dealer on the books of the banking association."

Said section 13 of the act of July 12, 1882, in a subsequent portion creates another class of offenses by the words "or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof" (*i. e.*, of section 5208), "or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty," etc. See p. 1, printed opinion in this case.

139 The latter class of offenses are not required to be committed "willfully," and this difference in the two classes of offenses is discussed by the Supreme Court in *Potter vs. United States*, 155 U. S., 446. It was conceded in all the trials of this case that the provision of the latter part of said section 13, quoted in the opinion at page 12, had no application under the indictments of petitioner.

It was, therefore, manifest error in this honorable court to apply that provision in the disposition of this case in any aspect.

Secondly, this honorable court seems to have overlooked the fact that the modification made by the circuit judge of the fifth request was more than a modification; it was a complete metamorphosis and reversal of its meaning; and not only this, but rendered it contradictory and confusing in the extreme. And whether it ought to have been given in its original form or not, it was error to give it as modified and changed.

The evidence showed, without contradiction, that on the day upon which the check was certified by the petitioner upon which he is sentenced, namely, the 3d of January, 1893, there was deposited by Dobbins & Dazey nearly twice the amount of the check certified. (Rec., p. 28.) There was also evidence tending to show that although their account was overdrawn during the period covered by the checks certified by petitioner, he did not know it, and that in certifying the checks he acted upon information received from either the cashier or exchange clerk that more than enough exchange had

been deposited by Dobbins & Dazy on each day of certification to cover the check certified.

Now, in view of this aspect of the case, the fifth request was for an instruction, in substance, that if the defendant was ignorant of the overdraft, and certified the checks in the belief, at the time, that the exchange deposited by the drawers on each day of certification was sufficient to cover the check certified on that day, he was not guilty, and should be acquitted [unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions]—the words in brackets being added by the court, but without objection.

Having added the above words in brackets, the court further inserted the words: "Besides the overdraft then existing," so as to make the instruction read substantially:

If the defendant was ignorant of the overdraft then existing, and certified the checks believing that the exchange deposited
140 was sufficient to cover the amount of the check certified besides the overdraft then existing, then he is not guilty, unless his ignorance of the overdraft was willful, as elsewhere explained in the charge.

Now, how can this be a proper instruction, whether in its original form it should have been given or not?

As given, it was not the instruction requested, nor anything like it; and it must be considered as if it had wholly originated with the court. It instructs the jury that, to be entitled to acquittal, the defendant must have believed the deposit sufficient to cover, not only each check certified by him, but also the overdraft then existing of which he had no knowledge, actual or constructive, according to the same instruction.

In effect, the instruction is, that defendant, in order to be innocent, must have seen that provision was made for the overdraft although he was utterly ignorant of such overdraft, both actually and constructively. It was equivalent to saying that defendant was only entitled to acquittal in the event the deposit covered both the check certified and the overdraft then existing on the books, whether he knew of the overdraft or not. It held him to knowledge of the overdraft although the jury should find that he had no such knowledge, actually, and although such knowledge could not be imputed to him from his "shutting his eyes to the facts," etc., as elsewhere explained by the court.

In short, the circuit judge by this instruction himself makes, absolutely, the inference of defendant's knowledge of the state of the account, which he elsewhere instructed the jury that they might make from his duty to know it, and this, too, even though the jury should find that he had no such knowledge, and was otherwise not chargeable with such knowledge.

The same most glaring error was committed by the trial judge in cutting off from its context the latter part of the seventh instruction, changing it in the same way, and giving it, as thus cut off and changed, as a separate and independent instruction—thus converting an instruction asked, which would have given the jury an op-

portunity to acquit, into an instruction under which it was not possible to acquit, for it was not possible for the defendant to contemplate a thing of which he had no knowledge.

This honorable court, in its treatment of these two instructions, on pages 11 and 12 of the opinion, wholly overlooks the fact that the fifth instruction, as given, actually assumes upon its face a finding of the jury of defendant's want of knowledge of the overdraft, both actually and constructively, and yet, notwithstanding this, holds him bound to see that such overdraft is provided for.

141 It is respectfully submitted that such an error ought not to be permitted to stand, when attention is called to it, and that this honorable court ought now to correct it by a reversal.

VII.

The error complained of here is in reference to the action of the circuit judge upon the request of the jury for further instructions as to false certification of checks, and this honorable court's disposition of that question.

It has been shown, we think clearly, that the court had not previously given the jury any full and clear definition of the offense charged. It had not stated that any criminal or bad purpose or intent was necessary. It had not even used the word "willfully," as applied to the act of certification, and the only special instruction requested employing that word in such connection (the sixth) had been refused. The word "willfully," as used in the statute of 1882, and the intent implied by it, had been discussed in argument, as the record shows, Government counsel having admitted, in his opening statement, the necessity of proving such intent, and day after day having been consumed with evidence of circumstances collateral to the main issue, adduced to show such intent. The court had not even read to the jury the act of 1882, creating the offense.

Now, under these circumstances, the jury, after deliberating some hours, return into court and say: "We want the law as to the certification of checks when no money appeared to the credit of the drawer."

The court read to them, twice, section 5208, Revised Statutes, and, then, after a lecture upon the evil of certifying checks without funds to meet them, omitting any reference to the knowledge of the certifying officer, or his intent in making the certification, he tells the jury, in so many words, "That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it." The court concluded by saying, "You understand what I have said now is to be taken in connection with what I have before instructed you" (Rec., p. 53).

Now, turning to the general charge, beginning on page 86 of the brief on motion for new trial (see page 87 for words quoted), it will be seen that, after setting out the four checks described in the indictment, the trial judge said: "It is upon the false certification of the four above-mentioned checks that the issues of this case are joined."

142 It is thus seen by reference to what the circuit judge had previously instructed the jury, that what he had in mind in defining a false certification to the jury on their return into

court, and what the jury must necessarily have understood him to refer to, was a criminal, false certification—the kind of false certification upon which “the issues in this case are joined.”

Seeing what the judge had reference to, and what the jury necessarily must have understood him to have reference to, counsel for petitioner arose when these last instructions had been given and the jury were retiring from their seats, and stated to the court that he thought what the jury wanted was the act of 1882, making it a misdemeanor to willfully violate the section of the Revised Statutes which had been read to them, and that the court ought to read and expound that act to them. This the court refused to do, remarking that the jury had nothing to do with that act (Printed Rec., pp. 53-’4).

Now, as we understand the opinion of this honorable court, the action of the trial judge at this point is approved on the ground that our contention “that the court gave the jury to understand that the certification of a check when there were no funds in bank to meet it was sufficient to sustain the indictment,” is an assumption which is negated by the answer of the jury” (p. 13 of opinion).

That our contention was not an assumption, but was based upon fact, we submit, has been demonstrated. As to the “answer of the jury,” that their question had been answered, negating our contention, it ought to be sufficient to remind the court that the jury were not the arbiters of the law, nor the censors of the judge as to matters of law. They had asked the judge for instruction in a pure matter of law, and it was the judge’s duty to instruct them correctly. Whether he satisfied the jury or not is wholly immaterial; the question is, did his instruction satisfy the law?

VIII.

This paragraph relates to the admission in evidence of the stock transactions of 1886 and 1887. We do not think the court has given due weight to the numerous authorities cited on this point in our record brief, nor that those cited by the honorable court in its opinion support its conclusions; but this brief is already too long to admit of our going into these questions further. We ask, however, that the court, in reviewing the case on other points which we have elaborated, also review and reconsider the facts and the authorities cited on this point, both in the opinion and in our record brief.

143

IX.

This paragraph relates to the disposition of several instructions, some given and some refused, upon the effect of Porterfield’s dealings in stocks and bonds, in the name of the bank and individually, upon petitioner’s right to rely upon his statements with reference to the condition of the Dobbins & Dazey account at the date of petitioner’s certification.

Without elaboration of these several instructions, we submit, generally, that the honorable court, in its opinion, has not apparently apprehended our contention in reference to them; which was, in

brief, that the action of the court denies to defendant the right to rely upon the statements of the cashier in respect to matters of the bank under his charge, if he knew that the cashier was conducting stock purchases and sales on margin for the customers of the bank, as all other cashiers and banks in the city were doing, and for the benefit of the bank in the commissions received, because such transactions were not within the corporate powers of the bank, although defendant had no knowledge or suspicion, and was chargeable with none, that Porterfield was converting or misapplying the bank's funds or acting dishonestly in any way—in other words, that defendant's knowledge of a technical violation of the national banking law by the cashier, involving no moral turpitude or dishonesty or in veracity whatever, would deprive him of the right to rely on anything the cashier might say with respect to other and independent matters under his charge as cashier; whereas, our contention was that the acts of the cashier, known to defendant must have involved some moral turpitude, some infidelity to the interests of the bank, or some untruthfulness, before they could have that effect.

This view, we respectfully submit, is sustained by all the authorities, without a single exception; and it is not met in the opinion of this honorable court.

The position of the circuit judge on this question, as shown by the action cited in this paragraph of the petition, is the same as if he had charged the jury that, if the cashier, with defendant's knowledge, had charged a borrower from the bank 12 per cent. for a loan in Tennessee, where only 6 per cent. is lawful, and thereby violated the national banking law, the defendant could not thereafter rely upon anything such cashier might say with reference to the bank's affairs under his charge.

We submit, most respectfully, that this is not law.

144

X.

This paragraph relates to the disposition of the question raised by the nineteenth assignment of error, upon the exclusion of testimony as to defendant's good character for truth and veracity.

We confess we do not understand clearly the opinion of the honorable court on this question.

Whether the court means to hold that evidence of good character for truth is not admissible until after evidence of bad character has been offered, as the circuit judge held, is not stated. If so, then we submit that such holding is against reason and the overwhelming weight of authority.

The opinion does not state that the court finds no assault was made in the cross-examination of defendant upon the honesty and integrity and sincerity of his testimony.

It does not state that the cross-examination did not manifest a purpose to argue to the jury that defendant had not testified honestly and conscientiously, but had testified falsely. It makes no reference to the fact, plainly stated in the record (p. 98), that counsel for the Government did, in fact, in his argument, insist "that the

defendant had not testified truthfully, and that his testimony was unreasonable and not worthy of belief."

It makes no reference to the further fact, also plainly stated in the record (pp. 98-'9), that the honorable circuit judge himself assaulted the integrity of defendant's testimony, in the charge.

And so, we do not know really what the views of this honorable court are on these questions. But it is clear the opinion does not notice at all the points upon which reliance was placed in argument for a reversal of the action of the trial court; and we respectfully ask this honorable court to review and reconsider this nineteenth assignment of error.

PITTS & MEEKS,
BAILY P. WAGGENER,
Counsel for Petitioner.

145 And afterwards, to wit, on July 4th, 1898, an application to stay mandate was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR, Plaintiff in Error, }
v. } No. 502.
THE UNITED STATES, Defendant in Error. }

STATE OF TENNESSEE, } ss:
County of Davidson, Middle District of Tennessee, }

Marcus A. Spurr, the above-named plaintiff in error, states that he desires and purposes, in the event his petition for rehearing now pending before the United States circuit court of appeals, in this cause is denied, to make application to the Supreme Court of the United States at the earliest possible day for a writ of certiorari, and a review of the case in that court. He is advised and believes that such application can only be made to the Supreme Court when in session; and that it has finally adjourned for the present term, and will not again be in session until in October next. He is advised and verily believes that he has good ground for his contemplated application for certiorari, in case his petition for rehearing shall be denied, and he purposes, in the event stated, to make such application in good faith and not for delay; and he respectfully asks this honorable court, in view of the circumstances, and in the event his petition for rehearing is denied, to stay the issuance of the mandate herein until his said application for certiorari can be made to and disposed of by the Supreme Court.

MARCUS A. SPURR.

Sworn to and subscribed before me July 2nd, 1898.

H. M. DOAK.

I am of counsel for the above-named affiant and, in my opinion, the above application for stay of mandate and the contemplated

application to the Supreme Court for the writ of certiorari are well founded in point of law.

[SEAL.]

JOHN A. PITTS,
Of Counsel for Affiant.

146 And afterwards, to wit, on October 8th, 1898, an order was entered in said cause; which order reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

MARCUS A. SPURR }
v. }
THE UNITED STATES. }

On consideration by the court, the petition for rehearing and application for stay of mandate filed herein, are both denied.

And on motion of plaintiff in error to have the entire charge and instructions of the circuit judge upon the trial of this cause formally incorporated into and made part of the record, and it being within the knowledge of this court that upon the argument before it on the 17th day of November, 1897, it was agreed by counsel for both parties then and there present that the entire charge and instructions of the circuit judge upon the trial were correctly printed on pages 86 to 100 inclusive, of the printed brief of counsel for plaintiff in error on the motion for new trial and that the same should be then and there made part of the record and submitted to this court as such, which by the assent and approval of the court was accordingly done and said entire charge was then and thereafter considered by the court as part of the record in determining the cause, the said motion is allowed; and the said copy of the charge being now here in court, the clerk will file the same as part of the record in this cause.

And afterwards, on the same day, to wit, on October 8th, 1898, the said copy of the charge was filed as part of the record in this cause and is in the words and figures as follows:

Copy of Charge of the Circuit Judge.

Filed Oct. 8, 1898. Frank O. Loveland, clerk.

Entire charge of court as given, showing in quotations the portions of defendant's special instructions which were granted.

147 GENTLEMEN OF THE JURY: Your patience and fidelity in the attention which you have given to this case thus far afford ample grounds for confidence that you will pursue your duty to the end with the same sincere fidelity of purpose.

The conduct of their business by national banks is carefully hedged about by many provisions of law intended for the security of the public doing business with them and of their stockholders. The necessity for that security requires that those provisions should

be faithfully enforced. The courts of the United States are the proper tribunals for that purpose. We are called upon in the present case to discharge that duty upon indictments charging grave violations of this law. Great care must be taken that punishment shall not fall upon an innocent person, but it is equally our duty, if the charges are proven beyond a reasonable doubt, to proceed to the conclusion which legal justice requires. The usage and practice of these courts is founded upon the legal proposition that it is the province of the court to decide all questions of law, and that it is the province of the jury to decide the questions of fact. Whatever may be the usage and practice in the State courts of Tennessee, the law of the United States, by which the court and jury are bound in the disposition of this case, is to the effect which I have just stated. The sum of the matter is, then, that the jury are bound by the instructions of the court as to matters of law. The suggestions of the court as to evidence, touching matters of fact, are for the assistance of the jury, but it is the right and duty of the jury to finally determine all questions of fact without being trammelled by the suggestions of the court. It is usual in these courts for the judge to make such comments upon the evidence as the court may think expedient for the purpose of aiding the jury in reaching a disposition of the case upon its substantial issues, but this is the limit of the duty of the court upon such matters, and the jury will receive and act upon such suggestions so far as they may find them useful to them in their inquiry after the truth.

The specific charges upon which the defendant is now being tried are the certification of the following checks:

Check of Dobbins & Dazy on the Commercial national bank to Fourth national bank, dated December 9, 1892, for \$15,000.

Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated December 17, 1892, for \$31,000.

Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated January 3, 1893, for \$40,000.

148 Check of Dobbins & Dazy on Commercial national bank to Fourth national bank, dated February 13, 1893, for \$9,641.95.

Each of the offences just charged constitutes a specific violation of the law. It is competent for the jury to find the defendant guilty of all, or not guilty of any, or guilty of some and not guilty of others, or to find the defendant guilty or not guilty of some of them, being unable to agree as to others. It is upon the false certification of the four above-mentioned checks that the issues of this case are joined. The evidence of the former application of the funds of the Commercial national bank by Mr. Porterfield in his own speculations and those of himself and Spurr, with the knowledge of Spurr, has been admitted for a subsidiary purpose which will be presently explained. Reference is here made to the evidence of the transactions with De Neufville & Co., Herzfield & Co., Kohn, Popper & Co., and Latham, Alexander & Co., in New York.

In all trials upon accusation of crime the defendant is presumed to be innocent until that presumption is overborne by testimony

proving him to be guilty. The defendant is entitled to such a presumption in this case. The fact that there have been former trials of this case does not affect your duty; you are responsible for your verdict, and you are not here to register the opinion of others nor to follow in their wake. Your conduct should be wholly unaffected by the result of such former trials.

The Government is bound in order to maintain any of the counts in these indictments to prove:

First, that the defendant certified the check.

Second, that the drawers of the check had not sufficient funds in the bank to meet such check.

Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offence charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly that the account of the drawers was overdrawn when these certifications took place, but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazy's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court
149 charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazy from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazy's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazy's account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazy had no funds there to meet their check and that there was no warrant for marking the check "Good," that was sufficient.

I am requested by counsel for the Government to instruct you, and you are charged, that if you are satisfied by the proof beyond a reasonable doubt that the account of Dobbins & Dazy with the Commercial national bank was not a special but a general depositor's account, the deposits as they came into the bank were *prima facie* applicable to the liquidation of overdrafts which appeared on the account at the commencement of business, and were thus absorbed, and if the amount of deposits made during the day were not equal to the overdrafts with which the day commenced, you

will consider that, as a matter of fact, there were no moneys on deposit on such day.

These checks before their certification were not obligations of the Commercial national bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications believing that the state of the account of Dobbins & Dazy
150 justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.

Evidence has been offered to prove Dobbins & Dazy to have been heavily overdrawn for some time when some of these checks were certified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employes of the bank; and further, that it was not customary for checks to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence, which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless, he testifies that he did not know that Dobbins & Dazy's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them and that he had no reason for supposing their amount to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question. Not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.

In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the facts, the moral probabilities flowing from conceded facts, or which are proven to your satisfaction should also be considered and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel for the defendant have submitted a series of requests for instructions, some of which I allow, others I give with modifications, which will be stated as I proceed, and others are declined,

either because in the opinion of the court they do not correctly state the rule of law or are liable to mislead. Such of them as are granted, I will now proceed to read and they will be regarded as part of the instructions of the court. They are to be taken, however, in connection with the propositions stated in these instructions by the court upon its own motion, and not as being in conflict with them.

151 I charge as requested: (1) "The statutes of the United States, under which the Commercial National Bank of Nashville was organized and conducted, do not prescribe or define the duties of the president and the cashier in respect to the books, accounts and details of the business of the bank; but they confer upon and vest in the board of directors the power to prescribe and define such duties and to adopt by-laws for that purpose."

Again: (2) "Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care, or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties." To this I add: But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.

(3) "If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge of such matters; and if you further find
152 that, in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and

internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazy at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of that account at the time he certified said checks."

To which I add: But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

Then this request: (5.) "If you find from the proof that the account of Dobbins & Dazy, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft: and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazy on the days upon which said checks were certified, was sufficient or more than sufficient to cover the amount of said checks," besides the overdraft already existing, "then he is not guilty and you should acquit him"—unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions. In this connection, you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins & Dazy, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins & Dazy to respond to the checks.

(7.) If you find, "that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified,"—I add: in addition to the existing overdraft—"he would not be guilty under the indictment and you should acquit him."

153 (8.) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment that Dobbins & Dazy did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith"—these words mean substantially the same thing—"shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."

(10.) "If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazy, and that he did so in good faith believing those statements and representations to be true," and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, "his certifications, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and" right conduct as respects the affairs of the bank, "the defendant would have the right to rely upon his statements in regard to that account."

(11.) "The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew that fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier "had been using the funds or credits of the bank" instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank, and was acting" unlawfully in respect to its affairs.

(12.) "The defendant in this case is not indicted, nor being tried for buying or selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters"—I interpolate, on his individual account, without involving the bank. "You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find
154 beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazy did not have funds and credits on deposit in the bank sufficient to meet those checks."

(15.) "The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

(16.) "The burden of proof rests upon the Government as to all the material facts and circumstances of the case, and if you have a reasonable doubt as to any fact or circumstance relied on by the Government," I should say, any material fact or circumstance relied on by the Government, "either as direct or inferential proof against

him, you should resolve that doubt in his favor, and dismiss such fact or circumstance from further consideration. You must be satisfied from the proof beyond a reasonable doubt, of every fact essential to the guilt of the defendant of the specific charges in this indictment before you will be warranted in convicting him."

I return now to the instructions given upon the court's own motion. The defendant, by a modern statute, is rendered competent to testify in his own behalf. His testimony is subject to be estimated with reference to the interest which he has in the result, and the jury will give it such credit as they think it is justly entitled to in view of its quality, the witness' burden of interest and the bearing of the other evidence in the case upon it.

The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on either in the interest of the bank or its officers as individuals, or any other persons is unlawful; their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view

155 which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazy with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of the knowledge and intent of the respondent, when he made the false certifications of the checks mentioned in the indictment.

Mr. Porterfield has been called to the stand as a witness. The court has been requested to instruct you in regard to the proper weight to be given to his testimony. He is a competent witness as a matter of law. There are, besides, this certain rules which have been thought to be useful in sifting the testimony of accomplices and fixing its weight. They are not of binding force as rules of law but are to assist the judgment in forming prudent conclusions, for in the end, the jury must form their judgment of such testimony upon all the circumstances and facts proven before them, and the impressions which all collectively produce upon their minds.

Some of the rules just referred to are, that such testimony, that is, the testimony of an accomplice, is to be taken and regarded with caution and that it is not safe to act upon it unless it be confirmed

in some material part of the witness' testimony. If it be thus confirmed, then the jury may act upon it throughout, if upon the whole they find it worthy of credit. The situation of the witness at the time of testifying is to be regarded; whether before his own sentence, and under expectation of gain from giving the testimony, or whether he has nothing to gain from such testimony or any other circumstances which the jury may see is properly to be regarded in estimating its weight.

Two witnesses have been called to testify that Mr. Porterfield on certain occasions made statements inconsistent with his present testimony. In considering that testimony you will naturally consider, not only what was the actual admission made, but also the
156 circumstances and for what motive the admission or statement was made. Has the admission been correctly related?

Did it go beyond a statement that he was the principal and had been the leader in wrong doing, and that he had carried Spurr on the outside of the transactions as respects the entries in the books of the bank, or did he go further and state that Spurr had nothing whatever to do with any of the wrong things which had been done, and in considering the accuracy of the relations made by one of the witnesses who has testified you may properly consider any such zeal or interest in the obtaining of it as the testimony in your view justly warrants you in believing. If his statements then made are correctly reported, then the motive of Porterfield in making them may properly be inquired into. Did he make them, knowing that his own doom was sealed; because he was willing to shield Spurr, or did he make the statements under pressure of his conscience and because they were true? But whatever Mr. Porterfield may have said on these occasions is not to be taken as proof of the fact, but only for the purpose of affecting Porterfield's credit, and for every other purpose such statements as detailed here are mere hearsay. This distinction it is proper for the jury to understand and apply. The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever credit his testimony delivered here may be entitled to, the question remains for you to settle upon all the evidence whether the defendant Spurr in certifying these checks acted in good faith, and without any intent to do that which the law forbids and which he must be presumed to know was unlawful, namely, the certifying of the check as good when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them he should be acquitted. If he certified the checks, either knowing that the funds to respond were not in the bank and that the making of the check was unwarranted, or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt. That is to say, so

proven as to persuade a clear and abiding conviction of the defendant's guilt, such conviction as is not shaken by any reasonable doubt, grounded upon the testimony. If you are so convinced of his guilt, he should be convicted, otherwise not.

I have thus presented to you what seems to the court the salient features of the case, and I now leave it to you to decide according to your convictions of the truth under the solemnity of your oaths, and that inflexible sense of duty which every right-minded juror must experience in determining an issue of such grave import to the public on the one hand and the private citizen on the other.

The jurors have in mind the dates and amounts of these several checks? Would they desire a brief abstract of them?

(By a JUROR): And the state of the accounts at the time those checks were certified; we would like to have an abstract of that.

(By the COURT:) You can retire, gentlemen, and we will see to the sending to you, in the care of the bailiff, of these details.

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record printed in accordance with stipulation of counsel and used at the hearing in this court together with the proceedings of this court, in the case of Marcus A. Spurr vs. The United States of America, No. 502, October term, 189-, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this 19 day of Oct., 1898.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,

*Clerk of the United States Circuit Court of Appeals
for the Sixth Circuit.*

157½ Endorsed on cover: Case No. 17,033. U. S. C. C. of appeals, 6th circuit. Term No., 448. Marcus A. Spurr, petitioner, vs. The United States. Exhibit to petition for writ of certiorari. Filed October 24, 1898.

158 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Marcus A. Spurr is plaintiff in error and The United States

is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the middle district of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send, without delay, to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

I return foregoing writ this 13th day of December, 1898, pursuant to a stipulation of counsel filed this day in the clerk's office of the United States circuit court of appeals for the sixth judicial circuit. Said stipulation reads as follows:

"It is stipulated and agreed by counsel for petitioner and counsel for respondent in the above-entitled case that certified copies of the following shall constitute the return of the clerk of the United States circuit court of appeals for the sixth circuit to the writ of certiorari issued to that court in the above-entitled case from the Supreme Court of the United States, viz:

I.

The indictments Nos. 7994, 8078, and 8139, to be copied in that order, it being the order in which they were fastened together at the time of the trial which resulted in the verdict of guilty.

II.

The order made by the circuit court of the United States for the middle district of Tennessee on May 22, 1894, consolidating said indictments.

III.

The entry on the minutes of said circuit court, dated March 30, 1896, showing the empanelling of the jury that rendered the verdict against the petitioner.

IV.

The printed part of the record used on the hearing of said case in said circuit court of appeals.

V.

All proceedings that were had in said case in said circuit court of appeals, including the opinion delivered by said court.

Signed this 10th day of December, 1898.

JNO A. PITTS,
ALBERT H. HORTON,
B. P. WAGGENER,
Attorneys for Petitioner,

By JNO. A. PITTS.
J. K. RICHARDS,
Solicitor General,

By A. M. TILLMAN,
U. S. Attorney for the Middle District of Tennessee."

In testimony whereof I hereby subscribe my name and affix the seal of the U. S. circuit court of appeals for the sixth circuit, at Cincinnati, O., this 13th day of December, 1898.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of said Court.

160 [Endorsed:] Case No. 17,033. Supreme Court of the
United States. No. 448. October term, 1898. Marcus A.
Spurr vs. The United States. Writ of certiorari and return. Filed
Dec. 15, 1898.

161 Supreme Court of the United States.

| | |
|--------------------|------------|
| MARCUS A. SPURR | } No. 448. |
| <i>vs.</i> | |
| THE UNITED STATES. | |

It is hereby stipulated by counsel for both parties that the clerk of the circuit court of appeals, at Cincinnati, may omit the matter embraced in paragraphs IV and V in stipulation of Dec. 10th, 1898, filed with him in this cause, said matter having heretofore been certified by him to the Supreme Court, and that he certify only such parts of the record as are specified in paragraphs I, II, and III of said stipulation of Dec. 10th, 1898.

This Feb'y 20th, 1899.

ALBERT H. HORTON,
BAILEY P. WAGGENER,
JNO. A. PITTS,
Attorneys for Marcus A. Spurr.
ED. BAXTER,
Of Counsel for U. S.
JOHN G. THOMPSON,
Ass't Att'y Gen'l.

Sections I, II, and III of the stipulation of Dec. 10, 1898, are as follows:

162 "I. The indictments Nos. 7994, 8078, and 8139 to be copied in that order, it being the order in which they were fastened together at the time of the trial, which resulted in the verdict of guilty.

"II. The order made by the circuit court of the United States for the middle district of Tennessee on May 22, 1894, consolidating said indictments.

"III. The entry on the minutes of said circuit court dated March 30, 1896, showing the empanelling of the jury that rendered the verdict against the petitioner."

ALBERT H. HORTON,
BAILEY P. WAGGENER,
JNO. A. PITTS,

Att'ys for Petitioner.

ED. BAXTER,

Of Counsel for U. S.

JOHN G. THOMPSON,

Ass't Att'y Gen'l.

163 [Endorsed:] File No. 17,033. Supreme Court U. S., October term, 1898. Term No., 448. Marcus A. Spurr, petitioner, vs. The United States. Stipulation that clerk of circuit court of appeals may omit certain parts of record, &c. Filed Feb. 20, 1899.

164 In the Supreme Court of the United States.

MARCUS A. SPURR }
v. } No. 502.
THE UNITED STATES. }

Supplemental Record.

165 Indictment No. 7994.

THE UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors for the United States of America and the district aforesaid, having been duly summoned, elected, empaneled, sworn, and charged to enquire for the body of the district aforesaid, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tenn., at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Con-

gress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on January 3, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there, on January 3, 1893, aforesaid, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1065, for the amount of \$40,000, to the order
166 of J. T. Howell, cashier, and notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not have on deposit with said Commercial national bank an amount of money equal to the amount specified in said check, but, on the contrary, were indebted to the said Commercial national bank in a large sum of money, he, the said Marcus A. Spurr, being then president of said banking association, without the knowledge and consent of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national bank, unlawfully, wilfully, and knowingly and without the consent of the bank and its board of directors and committees, certified a — drawn upon the said Commercial national bank by said company, to wit, the said Dobbins & Dazey, — they, the said Dobbins & Dazey, and he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

2nd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville,
167 in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on December 17, 1892, and on divers other days to the grand jury unknown, J. P. Dobbins & George A. Dazey, partners

as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there and on December 17, 1892, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1007, for the amount of \$31,000, to the order of J. T. Howell, cashier; that they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said Commercial national bank an amount of money equal to the amount specified in said check; that thereupon, to wit, on said 17th of December, 1892, he, the said Marcus A. Spurr, being then president of the said Commercial national bank, at Nashville and within the district aforesaid, without the consent and knowledge of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that he, the said Marcus A. Spurr, unlawfully, wilfully, and knowingly, in the manner and at the time and place aforesaid, being then an officer, to wit, the president, of said Commercial national bank, without the knowledge of the bank, its board of directors and committees, certified a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

3rd Count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on December 9, 1892, and on divers other days to the grand jurors unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That on December 9, 1892, aforesaid, said company of Dobbins & Dazey were indebted to the Commercial national bank in a large

amount of money, to wit, \$88,225.00, more or less, the exact amount being to the grand jurors unknown.

169 That the said Dobbins & Dazey, on the said 9th day of December, 1892, drew a check, being No. 936, to the order of J. T. Howell, cashier, on said Commercial national bank for the sum of \$15,000.00.

That they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said Commercial national bank an amount equal to the aforesaid sum of \$15,000.00.

That thereupon, to wit, on the said December 9th, 1892, the said Marcus A. Spurr, in Nashville, within said district, without the consent and knowledge of the bank and its board of directors and committees, wilfully certified said check so drawn by Dobbins & Dazey as aforesaid as good by writing thereon the words "Good. M. A. Spurr, president," and the same was paid to the order of said J. T. Howell by the said Commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that, in the manner aforesaid and at the time and place aforesaid, he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national —, without the knowledge and consent of the bank and its board of directors and committees, unlawfully, wilfully, and knowingly certified a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

170

4th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on the day and days and at the place aforesaid J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said Commercial national bank.

That then and there and on the 3rd day of January, 1893, said company of Dobbins & Dazey drew a check upon said Commercial national bank, being No. 1055, for the amount of \$40,000.00, to the

order of J. T. Howell, cashier, and, notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with the said Commercial national bank an amount of money equal to the amount specified in said check; but, on the contrary, were indebted to said Commercial national bank in a large sum of money, the exact amount to the grand jury being unknown, he, the said Marcus A. Spurr, being then president of said Commercial national bank, without the consent of the bank, its board of directors and committees, wilfully certified said check No. 1065, to the order of J. T. Howell, cashier, so as aforesaid drawn by Dobbins & Dazey on said 3rd of January, 1893, to be
 171 good by writing thereon the words "Good. M. A. Spurr, p't," and the amount of said check was thereupon paid to the order of said J. T. Howell, cashier, by the said commercial national bank.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and place aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said Commercial national bank, did wilfully violate the provisions of section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, wilfully, unlawfully, and knowingly certify a check drawn upon said Commercial national bank by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus Spurr, well knew, not having at said time on deposit with the said Commercial national bank an amount of money equal to the amount specified in the said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM,

U. S. Attorney, Middle District of Tennessee.

Endorsed: Witnesses W. H. Knox, W. J. Bond, Geo. Trabue, J. T. Howell called and sworn by me to give evidence before the grand jury on the within indictment this 20th day of April, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. Amended. The Commercial National Bank of Nashville, Tenn., instead — Commercial
 172 national bank. Travis Winham, foreman grand jury. Travis Winham, foreman grand jury. July 26, 1893. Filed April 20, 1893. H. M. Doak, cl'k, by E. L. Doak, D. C.

Indictment No. 8078.

THE UNITED STATES OF AMERICA, {
Middle District of Tennessee, }

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors for the United States of America and the district aforesaid, having been duly summoned, elected, empaneled, sworn, and charged to inquire for the body of the district aforesaid, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on February 27th, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee.

173 That then and there, on February 27th, 1893, aforesaid, said company of Dobbins & Dazey drew a check upon said The Commercial National Bank of Nashville, Tennessee, being No. 1242, for the amount of \$41,000.00, to the order of A. W. Harris, cashier, and notwithstanding they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not have on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, but, on the contrary, were indebted to said The Commercial National Bank of Nashville, Tennessee, in a large sum of money, he, the said Marcus A. Spurr, being then president of said banking association, without the knowledge and consent of the bank and its board of directors and committees, wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said A. W. Harris, cashier, by the said The Commercial National Bank of Nashville, Tennessee.

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner aforesaid and at the time and place aforesaid he, the said Marcus A. Spurr, being then an officer, to wit, the president, of said The Commercial National Bank of Nashville, Tennessee, unlawfully, wilfully, and knowingly and without the consent of the bank and its board of directors and committees, certified a check drawn upon said The Commercial National Bank of Nash-

ville, Tennessee, by said company, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville aforesaid.

That on February 13th, 1893, and on divers other days to the grand jury unknown, J. P. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee.

That then and there and on February 13th, 1893, said company of Dobbins & Dazey drew a check upon said The Commercial National Bank of Nashville, Tennessee, being No. 1209, for the amount of \$9,641.95, to the order of J. T. Howell, cashier; that they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, did not then have on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check; that thereupon, to wit, on the said 13th of February, 1893, he, the said Marcus A. Spurr, being then president of said The Commercial National Bank of Nashville, Tennessee, at Nashville and within the district aforesaid, without the consent and knowledge of the bank and its board of directors and committees,

175 wilfully certified said check as good by writing thereon the words "Good. M. A. Spurr, p't," and the said check was thereupon presented at and paid to the order of said J. T. Howell, cashier, by the said The Commercial National Bank of Nashville, Tennessee.

And so the grand jurors aforesaid upon their oaths aforesaid present that he, the said Marcus A. Spurr, unlawfully, wilfully, and knowingly, in the manner and at the time and place aforesaid, being then an officer, to wit, the president, of said The Commercial National Bank of Nashville, Tennessee, without the knowledge of the bank and its board of directors and committees, unlawfully, knowingly, and wilfully certified a check drawn upon said The Commercial National Bank of Nashville, Tennessee, by said com-

pany, to wit, the said Dobbins & Dazey, they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit with the said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM,

U. S. Attorney, Middle District of Tennessee.

Endorsed: Witnesses E. P. Moxey, A. B. Fisher, W. D. Fuller called and sworn by me to give evidence before the grand jury on the within indictment this the 26th day of July, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. John Ruhm, U. S. district attorney. Filed July 27, 1893. H. M. Doak, clerk, by E. L. Doak, D. C.

176

Indictment No. 8139.

THE UNITED STATES OF AMERICA, }
Middle District of Tennessee. }

Circuit Court of the United States, April Term, 1893.

1st Count.

The grand jurors of the United States of America and the district aforesaid, having been duly summoned, elected, empannelled, sworn, and charged to inquire for the body of the district, upon their oaths aforesaid present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and than and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee, that they, The said Dobbins & Dazey, were then and there, as he the said Marcus A. Spurr, being then and there president, as aforesaid, -hen and there well knew, indebted to the said The Commercial National Bank of

Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Robbins and Dazey—had then and there, as he, the said Marcus A. Spurr, also

well knew, no money and moneys on deposit with The said the Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 936.

NASHVILLE, TENN., Dec. 9, 1892.

Commercial national bank

Pay to J. T. Howell, cashier, or order fifteen thousand dollars.

\$15,000.00.

DOBBINS & DAZEY.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p's't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify
178 a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

2nd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof

and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company, trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus A. Spurr, being then and there president aforesaid, then

and there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the words and figures, to wit:

No. 1007.

NASHVILLE, TENN., Dec. 17, 1892.

Commercial national bank

Pay to the order of J. T. Howell, cashier, thirty-one thousand dollars.

\$31,000.00.

DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words, "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provisions of an act entitled

"An act in reference to certifying checks by national banks,"

180 approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully

certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there hav-

ing on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

3rd Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States, embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company, trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus

A. Spurr, being then president aforesaid, then and there well
181 knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the words and figures, to wit:

No. 1065.

NASHVILLE, TENN., Jan'y 3, 1893.

Commercial national bank

Pay to the order of J. T. Howell, cashier, forty thousand dollars.
\$40,000.00.

DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified

in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the *grnad* jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provisions of an act
182 entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of the check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

4th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers other days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said Marcus A.

Spurr, being then and there president aforesaid, then and
183 there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with the said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of A. W. Harris, cashier, upon the Commercial National Bank of Nash-

ville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 1242.

NASHVILLE, TENN., *Feb. 27, 1893.*

Commercial national bank

Pay to the order of A. W. Harris, cashier, forty-one thousand dollars.

\$41,000.00.

DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee, aforesaid, did wilfully and unlawfully violate the provision of an act 184 entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, Tennessee, by Dobbins & Dazey, a company doing business at Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

5th Count.

And the grand jurors aforesaid upon their oaths aforesaid do further present that on the 17th day of April, 1893, and on divers days before said day, the exact days being to the grand jurors unknown, Marcus A. Spurr was president of the Commercial National Bank of Nashville, Tennessee, at Nashville, in the State of Tennessee, within said district, a national banking association created, organized, and established under and by virtue of the laws of the United States embraced in title No. 62 of the Revised Statutes of the United States and the acts of Congress amendatory thereof, and then and there carrying on a banking business as such The Commercial National Bank of Nashville, Tennessee, in the city of Nashville, within said district.

That on the said day and days J. G. Dobbins and George A. Dazey, partners as Dobbins & Dazey, a mercantile company trading at Nashville aforesaid, were dealers with and customers of said The Commercial National Bank of Nashville, Tennessee; that they, the said Dobbins & Dazey, were then and there, as he, the said
185 Marcus A. Spurr, being then and there president aforesaid, then and there well knew, indebted to the said The Commercial National Bank of Nashville, Tennessee, in large sums of money, the exact amount of the indebtedness being to the grand jurors unknown, and they—that is to say, the said Dobbins & Dazey—had then and there, as he, the said Marcus A. Spurr, also well knew, no money and moneys on deposit with said The Commercial National Bank of Nashville, Tennessee.

That then and there, to wit, on the said day and days aforesaid, the said Dobbins & Dazey aforesaid drew their check to the order of J. T. Howell, cashier, upon the Commercial National Bank of Nashville, Tennessee, aforesaid, which is in the following words and figures, to wit:

No. 1209.

NASHVILLE, TENN., Feb. 13, 1893.

Commercial national bank

Pay to the order of J. T. Howell, cashier, ninety-six hundred forty-one $\frac{5}{100}$ dollars.

\$9,641.95.

DOBBINS & DAZEY.

[On the margin:] Dobbins & Dazey, Nashville, Tenn.

That the said Marcus A. Spurr, being then and there president of said The Commercial National Bank of Nashville, Tennessee, and as such president being authorized to certify checks drawn on said bank, did then and there wilfully and unlawfully and well knowing that the said Dobbins & Dazey did not then and there have on deposit with said bank an amount of money equal to the amount specified in said check *did then and there* certify the said check by writing on the face thereof the words "Good. M. A. Spurr, p't."

And so the grand jurors aforesaid upon their oaths aforesaid present that in the manner and at the time and within the district aforesaid the said Marcus A. Spurr, being then and there president of the Commercial National Bank of Nashville, Tennessee,
186 aforesaid, did wilfully and unlawfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, and did wilfully and unlawfully certify a check drawn upon the said The Commercial National Bank of Nashville, within said district, the drawers of said check aforesaid, to wit, Dobbins & Dazey, as he, the said Marcus A. Spurr aforesaid, then and there well knew, not then and there having on deposit with said The Commercial National Bank of Nashville, Tennessee, an amount of money equal to the amount specified in

said check, contrary to the statute in such cases made and provided and against the peace and dignity of the United States.

JOHN RUHM, *U. S. Att'y.*

Endorsed: Witness E. P. Moxey called and sworn by me to give evidence before the grand jury on the within indictment this 19th day of September, 1893, and on whose evidence this indictment was found. Travis Winham, foreman of the grand jury. A true bill. Travis Winham, foreman of the grand jury, Davidson county. John Ruhm, U. S. district attorney. Filed Sept. 19, 1893. H. M. Doak, clerk, by E. L. Doak, D. C.

187 On Tuesday, May 22nd, 1894, the following order was entered:

| | | |
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| UNITED STATES | } | 7994. 8078. 8139. |
| v. | | |
| MARCUS A. SPURR. | | |

The above-styled causes came on this the 22nd day of May, 1894, to be heard before the court upon the motion of the United States attorney—present, the defendant in proper person and by attorney—to consolidate the causes. Upon consideration thereof it is ordered that these causes be consolidated and heard together as cause No. 7994.

Entry, March 30th, 1896.

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|------------------|---|---------------------|
| UNITED STATES | } | 7994. Consolidated. |
| vs. | | |
| MARCUS A. SPURR. | | |

Came the United States attorney and the defendant, in proper person and also by his attorneys, and the said defendant being charged upon the indictment pleads not guilty thereto, and for his trial puts himself upon the country, and the said attorney for the United States doth the like; and thereupon came a jury of good and lawful men, to wit, John Doak, C. P. Cullom, Matt Patterson, V. L. Blanton, T. H. May, J. L. Lamberson, J. A. Campbell, S. M. Cowles, Matt Ethridge, W. B. Wyatt, Dr. Wash. Huddleston, and Arch. G. Moore, who, being duly elected and sworn well and truly to try the cause at issue, after hearing a part of the evidence in the cause, were respited until tomorrow morning.

188 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of parts of the record made pursuant to stipulation filed in the Supreme Court of the United States February 20, 1899, in the case of Marcus A. Spurr vs. The United States of America, No. 502, October term, 1898, as the same remains upon

the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this twenty-fifth day of February, 1899.

FRANK O. LOVELAND,

*Clerk of the United States Circuit Court of Appeals
for the Sixth Circuit.*

189 [Endorsed:] File No. 17,033. Supreme Court U. S., October term, 1898. Term No., 448. Marcus A. Spurr, petitioner, vs. The United States. Supplemental return to writ of certiorari. Filed Feb'y 27, 1899.

In the Supreme Court of the United States,

OCTOBER TERM, A. D. 1898.

PETITION FOR WRIT OF CERTIORARI REQUIRING THE
CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT
TO CERTIFY TO THE SUPREME COURT OF THE
UNITED STATES FOR ITS REVIEW AND DE-
TERMINATION THE CASE OF

MARCUS A. SPURR, Plaintiff in Error,

v/s.

UNITED STATES, Defendant in Error.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Marcus A. Spurr respectfully shows to this
Honorable Court as follows:

FIRST.

Your petitioner, Marcus A. Spurr, respectfully shows that he
is aggrieved by the verdict and judgment in the above entitled
cause in the Circuit Court of the United States for the Middle
District of Tennessee, pronounced on the 12th day of December,
1896, sentencing petitioner to two years and six months' im-
prisonment in the penitentiary of the State of New York, at Al-
bany, N. Y., and by the judgment of the United States Circuit
Court of Appeals for the Sixth Circuit, pronounced on the 1st
day of June, 1898, affirming the said judgment and sentence of
the said Circuit Court.

SECOND.

Petitioner is not guilty of the offense for which he was charged, convicted, and sentenced in said cause, and is advised and believes that he was not tried and convicted according to law.

THIRD.

Petitioner further shows that prior to the 25th day of March, 1893, he was President of the Commercial National Bank, of Nashville, Tenn., a national banking corporation organized under the laws of the United States; that said Commercial National Bank failed and was placed in the hands of a receiver on or about the 25th day of March, 1893; and that, at the April term, 1893, of the United States Circuit Court for the Middle District of Tennessee, he was indicted in said court for the offense of willfully certifying five checks drawn upon said bank by Dobbins & Dazey, well knowing that said Dobbins & Dazey had not at that time on deposit in said bank sufficient funds to meet said checks. Petitioner pleaded not guilty, and was tried upon said charge, first, before Hon. George R. Sage and a jury, in the early part of 1894, when there was a disagreement of the jury, and a mistrial entered; then, again, before Hon. Wm. H. Taft and a jury, in November, 1895, when there was an acquittal upon the several counts based on one of the checks, and a disagreement of the jury as to the others, and a mistrial entered; and then, again, before Hon. H. F. Severens and a jury, in April, 1896, when there was an acquittal upon the several counts based upon one of the checks, and a conviction based upon the other three checks, with a recommendation to mercy by the jury.

FOURTH.

Petitioner further represents that motion for new trial and in arrest of judgment having been entered, the same was argued and

taken under advisement by the Court until the 12th day of December, 1896, when the judgment and sentence aforesaid were pronounced.

FIFTH.

Petitioner further represents that a bill of exceptions having been made and filed, petitioner prosecuted a writ of error from the said United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, where the case was argued before the Hon. Judges Barr, Ricks, and Swan, District Judges of said circuit, on the 17th day of November, 1897, and the cause taken under advisement until the 1st day of June, 1898, when the judgment of the Circuit Court aforesaid was affirmed; and thereafter a motion for a rehearing was duly entered and filed in said cause, and the same was, on the 8 day of Oct., 1898, overruled and denied.

SIXTH.

Petitioner's defense was that he was not a bookkeeper and had no practical knowledge of bookkeeping; that he had no knowledge at the time of the certification of the checks mentioned in the indictment that the drawers thereof had not sufficient funds on deposit in the bank to meet them, but, on the contrary, that he had at the time information from the cashier and a clerk of the bank that said drawers did have ample funds on deposit in the bank to meet each and every one of said checks, and that he honestly relied upon this information in the certification of said checks, and in good faith believed that ample funds of the said drawers were on deposit in the bank to meet them. The evidence introduced and relied upon by the Government to show petitioner's knowledge of the want of funds was circumstantial, consisting chiefly of the fact that the account of the drawers of

the checks upon the individual ledger of the bank appeared to be overdrawn, that petitioner could have ascertained this fact by an examination of the ledger, and that it was his duty to know the state of the account before certifying the checks. This theory of the case was earnestly pressed upon the Court and jury by the prosecution, and in this connection the Court charged the jury as follows:

“ It was the defendant’s duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. *From the existence of such a duty you may draw an inference of fact that he did so inform himself*, if he did not already know it; but the presumption is not an absolute one, and *the defendant may show, if he can, that he did not, in fact, acquire information of the truth.*”

To which instruction exception was duly taken, and error thereon assigned. And, again, in the same connection, after granting an instruction construing certain by-laws of the bank defining the duties and responsibilities of the president and cashier, and requiring of them the faithful and honest discharge of their duties, the Court added:

“ But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and when the president assumed to certify these checks as good, *the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.*”

To which addition petitioner also duly excepted, and assigned error thereon. The Court also refused the following special instruction asked by petitioner:

“The defendant’s want of knowledge of the state of the account of Dobbins & Dazey at the time he certified the checks will be a complete defense to him unless you are satisfied, beyond a reasonable doubt, that such want of knowledge *proceeded from a will to disobey the law, or from an indifference to its commands.*”

To which refusal exception was duly taken, and error thereon assigned.

Petitioner testified that he did not know the state of this account, and there was other evidence, as the record will show, tending to establish that he did not know it, and that it was systematically kept from him by the cashier and other employees under him; and the Government undertook to convict him by a kind of imputed or constructive knowledge, and succeeded in doing so under the foregoing and similar instructions of the Court, which the record will fully disclose.

The Court failed, in the charge, not only to use the word “willfully” with reference to the false certification of the checks, but also to refer, in any way, to the Act of Congress of July 12, 1882, creating the offense for which petitioner was being tried; and after the jury had retired and been deliberating for some hours, they returned and handed to the Court the following request in writing:

“We want the law as to the certification of checks when no money appeared to the credit of the drawer.”

The Court replied as follows:

“I cannot better answer this question which the jury has put to the Court than by reading the section of the Revised Statutes which relates to that subject [reads from Section 5208, R. S.]: ‘It shall be unlawful for any of-

ficer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.' Does this answer your question?"

Foreman of the jury:

"Yes, sir."

The Court:

"I read it again, so that you may all understand it. [The Court read again that part of Section 5208, R. S., quoted above, and added:] Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the Court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit or line of credit.

"I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. *That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*"

As the jury were retiring, counsel for defendant said to the Court that he thought what the jury wanted was the Act of 1882 making it a misdemeanor to willfully violate the section of the Revised Statutes which the Court had read to them, and that the Court ought to read and explain that Act to the jury. The Court asked if counsel referred to the Act prescribing the penalty for false certification, and, on being answered in the affirmative, stated that the jury had nothing to do with that.

To this action of the Court, in reading twice, in response to the jury's request, the Section 5208 of the Revised Statutes, and refusing to read and explain the Act of 1882, and to the instructions given them at that time as to the elements and constituents of a false certification, exception was duly taken by petitioner, and error thereon assigned.

Petitioner is advised and believes that the Court, by these instructions, left the jury to understand that the offense for which petitioner was being tried consisted of the certification of a check by an officer of a bank when there were not sufficient funds on deposit to meet it, and that whatever knowledge was essential in the certifying officer was to be inferred from his *duty* to know the condition of the drawer's account—the idea of a conscious, willful violation of the law being entirely ignored; and it was upon this theory only, as petitioner verily believes, that the Government was enabled to obtain his conviction.

SEVENTH.

Petitioner further shows that the theory of his defense was fairly put, hypothetically, in two special instructions asked by petitioner, numbered 5 and 7, there being in the record and before the jury competent evidence by numerous witnesses on both

sides of the case tending to establish each and every hypothetical statement in them. Petitioner's defense was not, in any part of the charge, put fully and fairly before the jury.

The fifth instruction was given, but so modified by the Court by the insertion of the words in brackets as to reverse its meaning entirely. As modified and given, it was as follows:

“ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was, in fact, ignorant of such overdraft, and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks [besides the overdraft then existing], then he is not guilty, and you should acquit him unless such ignorance of the overdraft was willful, as elsewhere explained in the Court's instructions.”

The seventh was refused. It was as follows:

“ If you find from the proof that the defendant believed and understood, at the time the account of Dobbins & Dazey was taken and during its existence at the Commercial National Bank, that they were engaged in the purchase of cotton and its shipment to New York and other Eastern points; that they had numerous branch offices and agents in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the

parent house required large amounts of money; that to provide such funds the parent house expected to deposit, and that they were depositing, to their credit in the Commercial National Bank, drafts on their correspondents in New York secured by bills of lading for cotton, and then drawing their checks on the Commercial National Bank against such deposits; and that their deposits were expected to consist, and did consist, mainly of such New York drafts—if you believe from the proof that the defendant understood and believed that this course of business was to be, and was in fact being, pursued by Dobbins & Dazey at Nashville, and that the volume of such business would be large, and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the indictment that Dobbins & Dazey, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of kiting, as developed by the proof on the trial, and that, having no knowledge of the overdraft of Dobbins & Dazey's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day, and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

But the Court cut off from its context the latter part of the above instruction, modified it by the insertion of the words in

brackets, and gave this fragment of the instruction to the jury in that form as follows:

“ [If you find] that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day, and was in the bank, to cover the check certified [I add, in addition to the existing overdraft], he would not be guilty under the indictment, and you should acquit him.”

To the refusal of the said seventh instruction, and the modification of the fifth and of the latter part of the seventh, exceptions were duly taken by petitioner, and errors thereon assigned.

Petitioner is advised and believes that by this action of the Court, and especially by the modification of the fifth special instruction as above shown, the jury were in effect told that in order to be entitled to acquittal your petitioner must have believed the deposit sufficient to cover not only the check he certified, but also an overdraft, of which the jury might find he had no actual knowledge, and of which he could not be affected with knowledge by reason of his ignorance being willful, as elsewhere charged by the Court. In other words, as petitioner is advised, the Honorable Circuit Judge, by this modification of the fifth special instruction, himself made, absolutely, the *inference* of petitioner's knowledge of the state of the account which he elsewhere told the jury, as before shown, they might make from his *duty* to know it, and thereby removed all possibility of acquittal; for this instruction is plainly to the effect that petitioner should only be acquitted in the event the deposit was sufficient to cover both the check *and the overdraft*, although the jury should find that he was *ignorant of the overdraft*, and that his ignorance *was not willful*, so as to charge him with knowledge by shutting his eyes to the facts.

EIGHTH.

Petitioner further shows that, quoting from the bill of exceptions:

“ In the opening statement of counsel for the Government to the jury as to the facts and what the Government expected to prove as evidence that defendant Spurr certified the checks of Dobbins & Dazey willfully or with bad intent to injure the bank, he stated as follows:

“ ‘ 13. As further evidence that Spurr certified the checks of Dobbins & Dazey willfully or with bad intent to injure said bank, the Government expects to prove that in December, 1886, DeNeufville & Co. were stock brokers in New York, and that Porterfield sent them \$25,000 of the moneys of the Commercial National Bank to be used by them as margins for buying certain stocks on speculation for Porterfield, Spurr, and others.

“ ‘ Afterwards the account was transferred from DeNeufville & Co. to Latham, Alexander & Co., who were bankers and brokers in New York.

“ ‘ On May the 14th, 1887, certain of said speculative stocks was sold by Latham, Alexander & Co., at a loss of \$9,762.35, one-third of which (\$3,254.12) was admitted by the defendant to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note of May 12, 1887, for the amount; which note has been renewed from time to time, and the last renewal note, which is for \$5,500, is now in the hands of the bank's receiver, and the principal thereof is wholly unpaid.

“ ‘Another third of said loss (\$3,254.12) was admitted by Porterfield to be due from him. As he did not have money enough in the bank to make good his share of said loss, he made his note on May 21, 1887, for \$5,796.39 to cover his share of said loss and also another loss sustained by him on other speculations made through Latham, Alexander & Co.’

“ And thereafter on the trial, and before the Government rested, and as a part of its case in chief, it was permitted to prove certain stock transactions of Spurr and Porterfield, of dates November 12, 1886, November 26, 1886, December 16, 1886, January 15, 1887, and other like transactions prior to January, 1887, over the objection and subject to the exception of plaintiff in error.”

The checks certified, and for the certification of which your petitioner was indicted, were dated at different dates running from December 9, 1892, to February 27, 1893. This evidence was objected to upon the following grounds:

“ First. Its irrelevancy to the charges of the indictment.

“ Second. The remoteness in time of such transactions from the transactions involved in the charges of the indictment.

“ Third. The want of any connection between such transactions and those involved in the charges of the indictment.

“ Fourth. That such transactions were not shown to be fraudulent; nor, if so, that defendant had any knowledge of the fraud; and that they were neither similar nor con-

temporaneous transactions to the charges of the indictment, and their admission would tend to multiply the issues and to confuse the jury and prejudice the defendant."

This objection the Court overruled, and exception was duly taken by petitioner, and error thereon assigned; and it was thereupon agreed and understood, with the assent of the Court, that all subsequent testimony relating to collateral transactions of purchases and sales of stock, etc., should be treated as subject to the same objection and exception without repeating same at each offer. The evidence thus objected to and admitted by the Court, and to which this exception relates, is set out in the bill of exceptions (Printed Record, pp. ~~41-42~~) and is incorporated into the twelfth assignment of error.

The evidence was admitted by the Circuit Court, at the time, "as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose;" yet in his charge to the jury the Court instructed them that they could look to it as bearing upon petitioner's knowledge and intent in the certification of the checks of Dobbins & Dazey, in the latter part of 1892 and the early part of 1893.

It was not claimed, nor shown, on behalf of the Government, that there was any connection whatever between the alleged stock transactions of 1886 and 1887 and the certification of the checks in 1892 and 1893, nor that said transactions were fraudulent, nor that the bank suffered any loss through them.

The Circuit Court of Appeals affirmed the correctness of the action of the trial court by saying:

"Evidence of similar transactions to illustrate the char-

acter of the act in question has repeatedly been held competent in both criminal and civil cases, and is often the only method of establishing the intent with which they were done.

“ The objection that the collateral transactions were too remote is not tenable. It goes only to the weight of the testimony. The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the Court.”

It is contended by your petitioner:

First. That there is no possible similarity between the stock transactions of 1886 and 1887 and the certification of the checks of Dobbins & Dazey in December, 1892, and February, 1893.

Second. That the alleged stock transactions of 1886 and 1887 were not shown to have been either fraudulent or illegal, and could have had no possible bearing upon the intent with which petitioner certified the checks of Dobbins & Dazey.

Third. That the stock transactions of 1886 and 1887 were not only collateral, but were too remote to authorize the jury to draw any inference therefrom bearing upon the charge for which petitioner was indicted.

Fourth. That if said stock transactions of 1886 and 1887 were unlawful, they constituted in and of themselves an independent and separate crime, or violation of law, in no manner connected with or similar to the accusation against petitioner, and for which he was indicted.

But this contention of petitioner was overruled and denied by the trial court, when the evidence was offered, upon the erro-

neous theory that the transactions were competent for the purpose of showing that petitioner should not have relied upon the statements or honesty of Porterfield, the cashier; and afterwards, upon the contention of counsel for the Government, the jury were instructed that such transactions were relevant and competent for the purpose of showing knowledge on the part of petitioner that the account of Dobbins & Dazey was overdrawn at the bank on the date of the certification of these checks, and this latter ruling of the trial court was affirmed by the Circuit Court of Appeals upon the same erroneous theory and contention of counsel for the Government. No notice was taken by the Circuit Court of Appeals of the ground upon which this evidence was originally admitted.

NINTH.

Petitioner further shows that on the trial in the Circuit Court the charge of the Court, challenged by the sixth assignment of error, was as follows:

“ The Government is bound, in order to maintain any of the counts in this indictment, to prove:

“ First. That the defendant certified the check.

“ Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

“ Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them.

“ This last element of the offense charged will be explained and its modification stated further on.”

It was conceded on the trial:

First. That the defendant certified the checks.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check when the certification took place.

But the defendant denied any knowledge of such condition of the account and asserted that he certified the checks innocently, and not willfully or with criminal intent. The Court in its charge substantially stated this concession in the following words, immediately following the above quotation:

“ Taking this evidence up in detail, it is not denied that the defendant certified these checks, and, secondly, that the account of the drawers was overdrawn when these certifications took place, but, thirdly, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.”

The modification referred to above was then stated in the following language of the Court:

“ Knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the Court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time, or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account, or because he was purposed to certify the check without reference to whether there were funds sufficient

to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account or the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check, and that there was no warrant for marking the check 'Good,' that was sufficient.

* * * * *

"It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it; but the presumption is not an absolute one, and the defendant may show, *if he can*, that he did not, in fact, acquire information of the truth."

And the Court further added:

"But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and when the president assumed to certify these checks as good, *the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.*"

Petitioner is advised and believes that in the third element or clause of the above quoted definition of the crime charged there

was an erroneous omission of any reference to the essential bad intent or purpose which must accompany the act of certification, superadded to knowledge of the want of funds; and that in the subsequent explanations and modifications given by the Court of this third element of the offense, not only was this erroneous omission not supplied, but, on the contrary, the Government was relieved of the necessity of proving knowledge even, and the jury were told how they might *infer* knowledge from the *fact* of certification by petitioner as president when sufficient funds were wanting, and petitioner's *duty* under the law and the by-laws of the bank. And this erroneous view was further and finally emphasized by the Court when, on the return of the jury for further instructions, the Court told them in so many words that a false certification "is the certifying by an officer of a bank that a check is good when there are no funds there to meet it," making no reference to either the *knowledge* or to the *intent* accompanying the act, and refusing to charge upon a "willfully" false certification, as heretofore shown.

Petitioner is advised and believes that by these instructions he was practically prevented from interposing any defense whatever; for he was president of the bank, he did certify the checks, and the account of the drawers as it appeared on the individual ledger of the bank was at the time overdrawn, and none of these facts were at any time disputed or questioned by petitioner. The only facts disputed were the *knowledge* and *intent* of petitioner. The *intent* (implied by the use of the word "willfully" in the statute, and expressly charged in the indictment) was entirely ignored by the learned Circuit Judge; and as to the *knowledge*, the jury were told, in the first place, that several other things were the equivalent of knowledge, and, in the second place, that the by-laws of the bank imposed upon petitioner the faithful and honest discharge of his duties, and that "when the president as-

sumed to certify these checks as good, *the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.*"

These instructions, in connection with the undisputed facts, made out the case, according to the law as put by the charge, and left nothing for the jury but to return their verdict accordingly.

TENTH.

Petitioner instances these as some of the questions arising upon his said trial. He is advised that it is not necessary nor proper to cumber this petition with all of them, except to the extent as disclosed by the assignments of error hereinafter referred to.

ELEVENTH.

Petitioner was duly allowed by the said Circuit Court an appeal from its said judgment to the United States Circuit Court of Appeals for the Sixth Circuit, and it was ordered by the Court that a certified transcript of the record and of all proceedings in said case be transmitted to the said Circuit Court of Appeals, which was accordingly done.

TWELFTH.

The assignment of errors will be found at pp. 12-23- of the printed record accompanying this petition, and same is made part hereof.

THIRTEENTH.

On the 1st day of June, 1898, the United States Circuit Court of Appeals for the Sixth Circuit pronounced its judgment affirm-

ing the said judgment of the said Circuit Court. A copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals; and the same, including a copy of the opinion of the Circuit Court of Appeals, is marked "Exhibit A," and made a part of this petition.

FOURTEENTH.

Petitioner is advised and believes that the said judgment of the United States Circuit Court of Appeals in the said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the law in such cases made and provided.

Wherefore, petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein entitled,

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| " Marcus A. Spurr, | } No. 502. |
| Plaintiff in Error, | |
| vs. | |
| United States, | |
| Defendant in Error. | } Error to the Circuit Court of the United States for the Middle District of Tennessee," |

to the end that the case may be reviewed and determined by this Court as by law in such cases made and provided, and that petitioner may have such other and further proper and equitable relief as to this Court may seem appropriate, and that the said judg-

ment of the said Circuit Court of Appeals and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray.

MARCUS A. SPURR,
Petitioner.

UNITED STATES OF AMERICA, }
MIDDLE DISTRICT OF TENNESSEE. } ss.

Marcus A. Spurr, being duly sworn, says that he is the petitioner above named; that he has read the within and foregoing petition, by him subscribed, and that the facts therein stated are true to the best of his knowledge, information and belief.

MARCUS A. SPURR.

Subscribed and sworn to before me this the 22 day of
Oct., 1898.

H. M. DOAK,
Clerk United States Circuit Court for the Middle District of Tennessee.

PITTS & MEEKS,
B. P. WAGGENER,
Attorneys for Petitioner.

UNITED STATES OF AMERICA, }
MIDDLE DISTRICT OF TENNESSEE. } ss.

John A. Pitts, being duly sworn, says that he is one of the attorneys and counsel for Marcus A. Spurr, the petitioner above

named, and as such had personal charge of the case for him in the foregoing petition mentioned in the Circuit Court of the United States for the Middle District of Tennessee, and in the United States Circuit Court of Appeals for the Sixth Circuit; that he has read the said petition by said Marcus A. Spurr subscribed, and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

JNO. A. PITTS.

Subscribed and sworn to before me this the 22^d day of
Oct., 1898.

H. M. DOAK,
Clerk United States Circuit Court for the Middle District of Tennessee.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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|------------------------------|------------|
| MARCUS A. SPURR, PETITIONER, | } No. 448. |
| v. | |
| THE UNITED STATES. | |

MOTION TO ADVANCE.

The defendant in this case, formerly president of the Commercial National Bank of Nashville, Tenn., was convicted in April, 1896, in the circuit court of the United States for the middle district of Tennessee, of a violation of section 5208 of the Revised Statutes in unlawfully certifying certain checks. He sued out a writ of error from the circuit court of appeals for the sixth circuit, which affirmed the judgment of the circuit court. The case is before this court on a writ of certiorari granted upon the petition of the defendant.

The defendant has been tried three times for the offense for which he was indicted in 1893, the first two trials resulting in disagreements of the juries. He is now, and has been for a long time, at large on bail in the sum of \$10,000. In the meantime, I am advised the cashier

of the bank, charged with a similar offense, growing out of the same transactions, has been indicted, tried, and served out his term of imprisonment in the penitentiary. In view of the long delay in this cause the Solicitor-General respectfully moves the court to advance the cause upon the docket for hearing on such day during the present term as may be convenient to the court, in order that the sentence may be executed promptly or a new trial had.

Notice of this motion has been served on counsel for the defendant, and proof of service filed with the clerk of this court.

JOHN K. RICHARDS,
Solicitor-General.

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No. 448.

Supreme Court U. S.
FILED
OCT 29 1898
JAMES H. McKENNEY,
Clerk.

Plf. of Horton 448 Waggener
for Pet.

Supreme Court of the United States,
Filed Oct. 29, 1898.
MARCUS A. SPURR, Petitioner.

vs.

UNITED STATES, Respondent.

IN THE MATTER OF THE PETITION OF MARCUS A. SPURR
FOR THE WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Brief and Argument

—OF—

JNO. A. PITTS,
ALBERT H. HORTON,
BAILEY P. WAGGENER,
For Petitioner.

Supreme Court of the United States,

MARCUS A. SPURR, Petitioner,

vs.

UNITED STATES, Respondent.

IN THE MATTER OF THE PETITION OF MARCUS A. SPURR
FOR THE WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

Brief and Argument

—OF—

JNO. A. PITTS,
ALBERT H. HORTON,
BAILEY P. WAGGENER,
For Petitioner.

I.

GENERAL STATEMENT OF CASE.

May it Please the Honorable Court:

The petitioner was indicted in the Circuit Court of the United States for the Middle District of Tennessee, in 1893, for the false certification of checks, under the first part of the 13th section of the Act of Congress of July 12, 1882, Chapter 290, page 162, Acts of 1881-2, which is as follows:

“ Sec. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an Act entitled ‘An Act in reference to certifying checks by national banks,’ approved March 3, 1869, being Section 5208 of the Revised Statutes of the United States, . . . shall be guilty,” etc.

The pertinent portion of Section 5208, Revised Statutes, is:

“ It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.”

There were three indictments, each embracing several counts, all consolidated and tried together. They covered five checks, of different dates, running from December 9, 1892, to February 27, 1893, all drawn by Dobbins & Dazey. A sample of these counts, and one upon which the judgment of the Circuit Court is predicated, after the historical and descriptive portions as to which there is no question, is as follows:

“ He, the said Marcus A. Spurr, being then an officer—to wit, the President of said the Commercial National Bank—did wilfully violate the provisions of Section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, wilfully, unlawfully, and knowingly certify a check drawn upon said the Commercial National Bank by said company—to wit, the said Dobbins & Dazey—they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit

with the said the Commercial National Bank an amount of money equal to the amount specified in said check."

The case was first tried before Hon. Geo. R. Sage and a jury, resulting in a mistrial; again before Hon. W. H. Taft and a jury, resulting in an acquittal, under direction of the Court, upon all the counts based on the check of February 27, 1893, and a mistrial as to the other counts; and finally, before Hon. H. F. Severens and a jury, resulting in a verdict in the following words:

" They find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the Court."

Rec., p. 5.

The defendant's motions in arrest of judgment and for new trial having been overruled, the Court pronounced sentence of two years and six months' imprisonment upon the verdict as applied to the counts of the several indictments which were based on the check of January 3, 1893, for \$40,000. Sentence upon the other counts was by the Court deferred.

Rec., pp. 7-8.

Petitioner prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, where the case was argued on November 17, 1897, before Judges Barr, Ricks, and Swann; and on June 1, 1898, the judgment of the Circuit Court was affirmed. A petition for rehearing having been filed, the same was denied on October 8, 1898, and petitioner now applies for the writ of certiorari to bring the case to this Honorable Court for its review.

The accompanying petition presents briefly a statement of some of the errors complained of; and it is the purpose of this brief to present others, and to emphasize those referred to in the petition as far as may be done without repetition.

II.

GENERAL STATEMENT OF QUESTIONS OF LAW ARISING UPON THE RECORD.

The errors assigned, in their substance, may be stated as follows:

First: The exclusion of evidence offered by petitioner of his good character for truth and veracity, after the integrity of his testimony was vigorously assailed by counsel for the government on cross-examination—the reason for such ruling being that the government had offered no evidence of his *general bad character*.

Second: The exclusion of evidence offered by petitioner of his good character for honesty and integrity down to the moment of the trial, *upon the objection of the government*.

Third: The admission, over objection, of collateral evidence of *independent and dissimilar* transactions, having no connection whatever with the offense charged, and occurring *more than six years prior thereto*.

Fourth: The rulings of the Court, in many phases, during the trial, and in the charge, and in passing upon requests for special instructions, that knowledge of petitioner of a technical violation by the cashier of the national banking law, involving no *dishonesty, untruthfulness, or moral turpitude*, would deprive petitioner of the right to rely upon the statements of the cashier in respect to the state of the Dobbins & Dazey account under his charge, even though such technical violation was many years anterior to the connection of Dobbins & Dazey with the bank.

Fifth: The ruling of the Court in the charge, in several places,

that petitioner's knowledge of the want of funds, essential to his conviction, might be *inferred* by the jury from his *duty to know the state of the account* arising from the law and the by-laws of the bank.

Sixth: The erroneous definition of a criminal false certification in the charge, in that it omitted any reference to the *intent or purpose* of the act.

Seventh: The modifying of special instructions so as to make petitioner's acquittal depend upon his belief that certain funds deposited by Dobbins & Dazey, and on faith of which he certified their checks, were not only sufficient to cover the checks certified, but *also an overdraft of which the jury might find he neither had knowledge nor was chargeable with knowledge.*

Eighth: The refusal to give in charge, or explain to the jury the meaning of, the Act of Congress upon which the indictment is based, inhibiting a *wilful violation* of Section 5208 of the Revised Statutes; and, instead thereof, reading to the jury that section in reply to their request for "the law as to the certification of checks when no money appeared to the credit of the drawer;" and telling them, in so many words, in reply to such request, that what is meant by false certification "*is the certifying by an officer of a bank that a check is good when there are no funds there to meet it,*" after having previously told them that petitioner was indicted for the "false certification" of certain checks.

The specific action of the Court and the assignments of error raising these questions will now be cited, with authorities bearing on them.

The petitioner will be hereafter referred to as the defendant.

III.

EXCLUSION OF EVIDENCE OF DEFENDANT'S GOOD CHARACTER FOR TRUTH AND VERACITY.

The defendant testified as a witness in his own behalf, his direct and cross-examinations both being at great length and occupying parts of three days:

Rec., p. 78.

His direct testimony and cross-examination on several material points are set out in the bill of exceptions at pages 78 to 96 of the record. As will be there seen, the manner and substance of his cross-examination were most rigid, severe, and indeed insulting and humiliating to defendant, if it be granted that he was a man of probity and truth—a cross-examination evincing a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely and corruptly; and the record shows that in the subsequent argument of the case before the jury, counsel for the government did argue and insist that defendant “had not testified truthfully, and that his testimony was unreasonable and not worthy of belief.” And on this subject the Court, in the charge to the jury, said:

“ ‘ Nevertheless, he [referring to defendant] testified that he did not know that Dobbins & Dazey’s account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

“ ‘ Gentlemen, do you think this is true? It is for you

to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question.' ”

Rec., p. 98.

In order to meet this attack upon the integrity of his testimony, and in anticipation of the evident purpose of the prosecution which the sequel showed was not only carried out, but also very effectually aided by the Court itself, defendant offered evidence of his good character for truth and veracity, to which the government objected, and the objection was sustained and exception reserved. The contention of defendant and the ground of the Court's ruling is thus stated in the bill of exceptions:

“ Defendant's insistence was, that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely; but the Court, without determining this question, based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad character; and held that, there having been no proof offered by the plaintiff of defendant's bad character as a witness, no proof of his good character for truth and veracity could be offered by the defense.”

Rec., p. 98.

The 19th assignment of error is based upon this action of the Court, in part, and sets out the facts fully.

Now, what strikes the mind as most remarkable, in this remarkable episode, of this remarkable trial, is the fact that the learned Trial Judge, having denied the defendant the benefit of evidence of his good character for truth and veracity, *because*, as

it was assumed, his testimony had not been assaulted, should proceed *to make that assault himself* in his charge to the jury.

It is respectfully submitted that, to the minds of an intelligent jury, language could not have been framed which would have more effectually discredited the defendant. It was so delicate, yet so pointed. “Gentlemen, *do you think this is true?*” If the Court had told the jury in plain words that the defendant, in his opinion, was a *wilful and corrupt perjurer* and had *consciously sworn falsely* when he said he did not know the account was overdrawn, the statement would not have been so forcible and impressive as the question asked, in connection with the antecedent and subsequent expressions. And yet, no witness except Porterfield, a self-confessed perjurer, had contradicted the defendant on this point; no one else had sworn that he did know of the overdraft. There was nothing else in the record to challenge his testimony, except the method and manner of his cross-examination, and circumstances which, we insist, when fairly viewed, were more forceful in demonstrating his ignorance of the overdraft than in establishing his knowledge of it.

It is true the government offered no evidence of defendant's *bad character*. It is fair to assume that no such evidence was obtainable; but after this attack was made upon him by the cross-examination, was not this evidence admissible?

We do not deny that the authorities are in conflict on this point, but we do maintain that reason, justice, and the best considered adjudications support our contention that the evidence was admissible.

The Court will bear in mind, in the first place, that this is not a case of mere contradiction among witnesses, but it is a case where the government relies chiefly upon circumstances to establish guilt and upon discrediting the defendant's testimony establish-

ing innocence; a case, too, in which defendant's testimony *must* be discredited and set aside, or his acquittal must follow in any fair trial. It is not a case where the witness may be honestly mistaken. He knew of the overdraft or he did not, and whether he did or did not no one knows so well as he. He is either innocent of this offense, or he is a wilful and corrupt perjurer. There is no third horn to this dilemma.

Now the proposition of law which we propound, and shall attempt to support, is that—

In order to admit evidence of good character of a witness, it is not necessary that he shall be first impeached by evidence of bad character; but it is sufficient if his veracity and credit are fairly challenged by the manner of his cross-examination, or in any of the methods recognized by the law for the impeachment of a witness.

The precise question is aptly presented and adjudged in *Richmond vs. Richmond*, 10 Yerg. (Tenn.), 345. The whole paragraph of the opinion on the point is as follows:

“The next exception is to the introduction of certain witnesses to sustain the credit of Andrew Hamilton, who had been examined as a witness by complainant, on the ground that the character of said Hamilton had not been attacked by defendant. The record shows that Hamilton was subjected to a searching cross-examination by defendant's counsel, in which [were] many questions as to the situation of the buildings, his motives for being in the place where he witnessed the facts to which he deposed, etc., all going strongly to evince that no credit was given to his statements, and tending to make that impression on the jury. A witness may be impeached by proving that he is not worthy of credit, or that the facts to which he de-

poses are not true, or by cross-examination, in which he may be involved in inconsistencies. (3 Stark., 1853, 7-8.)

“ In this case the cross-examination was of a character from which the counsel manifestly intended to argue that the witness had sworn falsely; but, to put the matter beyond dispute, it is now earnestly argued, notwithstanding the witness has proved a good character, that this very cross-examination convicts the witness of a falsehood, and proves that he is unworthy of belief. It seems strange that, with this argument upon his lips, counsel should still maintain that the witness was not impeached. There was no error in permitting the plaintiff to prove Hamilton's good character.”

Nearly all the text-books on evidence are in accord. 3 Stark., pp. 1753, 1757, 1758:

“ The credit of a witness may be impeached either by cross-examination subject to the rules already mentioned, or by general evidence affecting his credit; or that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves. . . . Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and *in all cases* where the credit of a witness has been attacked, either by general evidence or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character. But the mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the

part of either, supplies no ground for admitting general evidence as to the character."

Mr. Greenleaf, after laying down various modes in which witnesses may be impeached, says, in Vol. 3, Sec. 469:

"Where evidence of contradictory statements by a witness, or of other particular facts—as, for example, that he has been committed to the House of Correction—is offered by way of impeaching his veracity, his *general character* for truth being thus in some sort *put in issue*, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth. So, if the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general character is admissible. . . . But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to character."

2 Taylor on Ev., Sec. 1746, quotes almost literally the foregoing section of Greenleaf, and adds:

"Though if *fraud*, or other *improper conduct*, be imputed to any of them, such evidence will then be received."

1 Phil. on Ev. (5th Am., from 7th and 8th Lond. Ed.), p. 306:

"In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, where veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity and of scrupulous regard to truth."

Roscoe on Crim. Ev., p. 181:

“ The credit of a witness may be impeached, either simply by questions put to him on cross-examination, or by calling other witnesses to impeach his credit.”

This author does not discuss the question of supporting impeached witnesses at all, at least in the edition to which we have had access.

In 1 Thompson on Trials the subject is exhaustively treated. Sections 551 and 552 are as follows:

“ 551. But where the direct impeachment of a witness is attempted, it is always competent for the party whose witness he is to call other witnesses to prove that his character is good. It has even been held that this may be done where the impeaching witness testifies that the character of the witness assailed is good, the view being that the mere fact that his character is questioned by the opposite party entitles the party whose witness he is to sustain it. Where the plaintiff introduced evidence tending to prove declarations of the defendant unfavorable to the character of one of his own witnesses as to veracity, this was regarded as an impeachment of the witness' character, such as authorized the defendant to testify that his character was good. In an action on a policy of insurance, where the defendant's evidence tended to show that the plaintiff burned his own building and committed perjury in his proof of loss, it was held that evidence of his good character was admissible.

“ 552. Some American courts hold that, whenever the character of a witness for truth is attacked in any way, it

is competent for the party calling him to give general evidence of his good character for truth; and that it is immaterial whether his character is attacked by showing that he has given accounts of the matter out of court different from that given by him in court, or by cross-examination, or by general evidence of his character for truth. This latter rule has been applied where the motives of the witness were assailed on a severe cross-examination; where evidence had been admitted to contradict the witness on an immaterial point; and even where an attempt was made to discredit the witness by disproving material facts testified to by him. Where one party introduces evidence that the witness of the other party has been suborned and paid for his testimony, the party whose witness is thus assailed may, in rebuttal, introduce testimony tending to show the good character of the witness for veracity. Another American court holds that, where a witness testifies to a material fact, and the opposite party calls a witness who contradicts the former witness as to such fact, and thereupon the former witness is allowed to be sustained by evidence of good character, the contradicting witness may be so sustained."

George vs. Pilcher, 28 Gratt., 299; S. C., 26 Am. Rep., 350:

"Whenever the truthfulness of a witness is assailed either directly or by cross-examination, or by evidence of inconsistent acts or statements, or by contrary evidence as to the matters testified to by him, his reputation for truth may be sustained by direct evidence adduced for that purpose."

In Payne vs. Tilden, 20 Vt., 554, Judge Redfield said:

"It is now well settled that whenever the character of a

witness for truth is attacked in *any way*, it is competent for the party calling him to give general evidence in support of the good character of the witness; and we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from that sworn to, or by cross-examination, or by general evidence of want of good character for truth."

Sweet vs. Sherman, 21 Vt., 24; and State vs. Roe, 12 Vt., 93; and numerous cases in that State are in accord.

In Newton vs. Jackson, 23 Ala., 335, where evidence was adduced to contradict a witness on an *immaterial* point, the party who called him was allowed to prove his general good character, although the opposite party disclaimed any intention of discrediting him.

In State vs. Cherry, 63 N. C., 493, it was held competent to sustain a witness by evidence of good character, where it was sought to impeach him by the very *question* put to him.

Without quoting the cases further, we cite the following among numerous others in full accord: Davis vs. State, 38 Md., 15; Burrell vs. State, 18 Tex., 730; Phillips vs. State, 19 Tex., App., 164; Harris vs. State, 30 Ind., 131; Clark vs. Bond, 29 Ind., 555; Lewis vs. State, 35 Ala., 380; Hodjo vs. Gooden, 13 Ala., 718; Haley vs. State, 63 Ala., 83; Vernon vs. State, 30 Md., 462; State vs. Cooper, 71 Mo., 436; State vs. Pruge, 44 La. Ann., 165; Mosely vs. Ins. Co., 55 Vt., 142; Stephenson vs. Gunning, 64 Vt., 609; Isler vs. Dewey, 71 N. C., 16; Glaze vs. Whitly, 5 Ore., 164.

The evidence is admissible by many English cases. See Bishop of Durham vs. Beaumont, 1 Camp., 207-210; Provis vs. Reed, 5 Bing., 435; Annesley vs. Lord Anglesea, 17 How. St. Tr., 1348.

Although a different rule prevails in Connecticut, yet even there evidence of general good character for truth was admitted of a witness who was a stranger, residing in another State, although he was not impeached. *Merriam vs. R. R.*, 20 Conn. 354; *Rogers vs. Moore*, 10 Conn., 13.

And in New York, where the rule prevails that supporting character evidence will not be admitted until there has been an impeachment by evidence of bad character, there has been protest against such rule by some of the judges.

In *Leonori vs. Bishop*, 4 Duer, 420, Judge Duer said that if the question were an open one, he would not hesitate to hold that evidence of the good character of a witness ought to be admitted in every case in which the *veracity* of the witness, and not merely the truth of his testimony, is denied by the adverse party. We think his reasoning so sound, and so applicable to this case, that we quote from it the following paragraph:

"An attack upon the moral character of a witness is because, when successful, it creates a probability that he has sworn falsely in the testimony that he has given; and it cannot be denied that an opposite probability is created, when the character of the witness, a man of integrity and truth, is fully established. It therefore seems to me that the evidence is in its nature corroborative, and as such ought to be admitted in every case in which intentional falsehood, no matter upon what ground, is imputed to a witness. There is a fallacy in the suggestion that, when the general character of a witness has not been impeached by the adverse party, it is admitted to be good. All that is admitted is that his character cannot be shown to be positively bad, but this is no reason for excluding evidence to show that it is positively good; nor is it difficult to see that in many cases the exclusion of such evidence may be a

source of error and injustice. The relation given by a witness may be very improbable in itself, yet perfectly true; for experience attests the justness of the observation that 'truth is not unfrequently stranger than fiction.' But it is obvious that the improbability of the relation may lead a jury to discredit a witness who, if it was clearly proved to them that he was a man distinguished for his probity and strict adherence to truth, they would not hesitate to believe. It is obvious that the probability that he has sworn truly, arising from the moral excellence of his character, might very reasonably outweigh, in the minds of the jury, the opposite probability arising from the nature of the facts to which he has testified. In judging of the credit to be given to the narrative, where the facts are remarkable and unusual, we are all of us governed by the knowledge we have, or the estimate we have formed, of the moral character of the person from whom the narrative proceeds; and it is not easy to understand why the evidence that determines the judgment of every reasoning person, in the ordinary transactions of life, should be withheld from the consideration of a jury."

Other cases in that State, and in Massachusetts, Connecticut, New Hampshire, Pennsylvania, Ohio, and perhaps some others, hold either that direct evidence of bad character, or evidence of extrinsic facts going to general character, is necessary before supporting evidence of good character is admissible.

But we respectfully insist that the rule declared by the textbooks we have quoted, and by the courts of Tennessee, Alabama, North Carolina, Louisiana, Texas, Missouri, Oregon, Indiana, Vermont, and Maryland—and we have no doubt of other States to which we have not had access—is supported by the better reason, the more obvious justice, and the greater weight of authority.

IV.

EXCLUSION OF EVIDENCE OF GOOD CHARACTER FOR HONESTY AND INTEGRITY.

Defendant at the same time, as will be seen from the references just given, also offered evidence of his good character for *honesty* and *integrity*, but *upon objection of the government* this evidence was limited, in time, to a date previous to the charge against him in this case. Defendant insisted upon giving this character of evidence unlimited scope, covering the entire period of his residence in Nashville down even to the moment of the trial; but the government chose to cut him off at the moment *it brought this charge against him*, and the Court so ruled.

To this ruling there was also exception, and it is likewise made the basis, in part, of the 19th assignment of error.

On this point we insist that every reason which can be urged for the admissibility of evidence of good character in a criminal case at all, supports the right asserted here, if the defendant chooses to avail himself of it and to assume the risk of putting in issue his character and standing at a period subsequent to the charge.

It is general law, nowhere questioned, that it is the *privilege* of a defendant to put his character for honesty and probity in issue or not, as he may elect. It cannot be put in issue by the prosecution. The State or government can offer no evidence upon it, until he first opens the question by himself offering such evidence. Then, and then only, may the prosecution offer countervailing testimony as to character. These are elementary and familiar principles.

Now what is the purpose of evidence of a defendant's good character in a criminal case? Why is it competent and admissible?

Said the Supreme Court in 164 U. S., just cited, quoting with approbation from an Illinois case which was an indictment for receiving stolen goods, knowing them to have been stolen:

“ Proof of uniform good character should raise a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man may repel the presumption of guilt arising from the possession of stolen goods. . . . A strong *prima facie* case was made out by the prosecution, but it was not conclusive. If the Court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised which would have resulted in his acquittal.” (P. 367.)

The authorities are agreed, as the case just quoted from states, that such evidence is *substantive*, and may itself generate a reasonable doubt. It is obviously just as true that the rational mind cannot fail to be impressed with the character of the party charged with a great crime when forming a conclusion as to his guilt or innocence, as that it cannot avoid being affected by the character of the author of an unusual or improbable narration when forming a conclusion as to the truth of that narration—so well expressed by Judge Duer in one of the cases above cited. The mental process involved is so natural as to be really involuntary, and is precisely the same in both instances. It is a question of reasonable probability. Is it reasonable that *such a man* would tell this story, if it be not true? Is it reasonable that *such*

a man would commit this crime? This, we submit, is the whole *rationale* of character evidence.

How, then, can it be justly said that the *strength* of character is not a material and important element? Is it to be assumed that every character which, upon the testimony of acquaintances, will pass muster as “good,” is *equally good*? Is it to be said that a shrewd adventurer who comes into a community, after a life of evil doing, and by moving in good society and deporting himself creditably for a few years and until he can steal his way into public confidence, and be enabled thereby to prove a “good character,” is to have the *same* benefit therefrom when charged with crime, as the man who has *always* lived there—whose acquaintances are the playmates of his boyhood, the companions of his youth, his daily associates for a quarter or a half century—who has built up *his* character by a long, uniform, and known course of correct and upright life, tried over and over again in the furnaces of adversity, of prosperity, of opportunity, of temptation, always coming forth without the smell of fire upon his garments, and lays that character, *with his whole life*, before the jury? It is sometimes said that character is what a man *is*, reputation is what he *appears to be*. Shall it be said that a man charged with a crime involving moral turpitude, and especially where he is sought to be convicted by mere circumstances, shall be denied the privilege of offering the *very best evidence* of the manner of man he is? What humane principle of the criminal law—and, thanks to the wisdom of the fathers, the very soul and spirit of the criminal law is *humanity*—forbids this privilege, sets bounds to it, and says to him: So much may be shown to the jury, so much shall be hidden from them? Nay, worse than that, what rule or principle of the criminal law licenses a *prosecutor*, in the name of the State, to trump up a false charge against an innocent man, publish it to the world, blacken his good name among strangers, and

then, when he offers his good character, perhaps his *only* defense, to say to him: You shall not show to the jury that that character is *strong enough* to stand, Gibraltar-like, unshaken by *this charge which I have brought against you*; you shall rest and remain under the *damaging inference* that your alleged good character is so weak that it has fallen before this accusation like a house built upon sand; you shall leave to me, for unimpaired use against you before the jury, the Satanic simile—once an archangel of heaven, yet a *devil* all the while?

Why should the *prosecutor*, or the *State*, object? Humanely, and mercifully, the law forbids the State to touch the character of the accused until he has opened it as an issue. Thus forbidden, what reason can justify the *prosecutor* or *State* in *nullifying* an important and substantial part of this privilege of a defendant?

It was urged below, and it is so held in some of the cases, that evidence of character *after* the charge is inadmissible, first, because it might *injure the defendant* by reason of the *effect* of the accusation upon his character; and, secondly, because such evidence would simply be the opinions of the witnesses upon the *fact of guilt or innocence*.

The first is wholly inapplicable where the *defendant himself* opens the question and offers evidence of his character *after* the charge, as we sought to do in this case.

The second is wholly fallacious and unsound. Testimony of the good character of a witness is not an opinion that the supported witness has testified truthfully; nor is testimony of his bad character an opinion that he has testified falsely. Testimony of the good character of an accused, *before* the charge, is not an opinion that he is innocent of the accusation; nor is testimony of his bad character, at that time, an opinion that he is guilty.

No more is testimony of a defendant's good or bad character, after the accusation, an opinion upon his guilt or innocence. It cannot be held otherwise, consistently with the admission of character evidence of any kind and in any sort of case.

We insist, therefore, that defendant should have been permitted to introduce the offered evidence of his good character down to the very moment of the trial, and that the rejection of that offer was error.

V.

ADMISSION OF EVIDENCE OF SEPARATE, INDEPENDENT, AND DISSIMILAR COLLATERAL MATTERS.

This error is treated briefly, though not fully, in the 8th paragraph of the petition for certiorari, pp. 11-15.

Attention is called to the fact that this 12th assignment is not printed in full among the assignments of error at pages 12-25 of the record. The reason is shown by the stipulation at pages 1 and 2 of the record. The failure of the printer to follow the direction of the stipulation as to paging results in some confusion, which it is proper to explain.

The paging printed, in the stipulation, is that of the original transcript, whereas the stipulation provided that the new paging of the *printed* record should be referred to. By reference to the note on page 4 of the "Detail Index" of the record, at the first of the volume, the printed pages containing the body of the assignments will be seen.

Without repeating the 8th paragraph of the petition, which.

however, should be read in connection with this argument on the 12th assignment, it is to be added—

First: That the purpose of this evidence, according to the opening statement of counsel for the government, was to show that defendant certified the checks in question "*wilfully or with bad intent to injure the bank.*"

Rec., p. 54.

Second: That the Court, in ruling upon defendant's objection to this evidence when offered, stated in substance that it was *not admissible* "for the purpose of affecting *the question of intent* by proving similar contemporaneous or near transactions;" but the Court held that it was admissible "as affecting the respondent's *right to rely on the representations made by Mr. Porterfield* [the cashier] or his assumed correctness of action and honesty of purpose;" and it was admitted for this purpose. It is also to be noted in this connection that this evidence was admitted as a part of the government's *case in chief*, and before defendant had offered any evidence that he had relied upon the statements of Porterfield.

Third: That the record shows that "there was no proof of any loss by the bank on account of these transactions of 1886 and 1887, nor of any dishonesty of Porterfield in respect to them, further than might be implied from the fact that such transactions were not authorized by the national banking law;" "that all the national banks of the city of Nashville conducted a like business for their customers, and that it was customary for national banks in various parts of the country to purchase and sell stocks for their customers, and to carry accounts with the New York brokers for that purpose, similar to the accounts proven in this case;" and that "there was no evidence tending to show that Dobbins & Dazey, or either of them, had any interest in, or any connection

with, those accounts and transactions of 1886 and 1887, or that they had any connection with the bank until October, 1891.”

Rec., pp. 61-2.

Fourth: That in the course of the trial, after evidence had been given by the government of stock purchases by the bank in 1886 and 1887 for account of defendant, Porterfield and one Cowan, assistant cashier, defendant's counsel was proceeding to show by cross-examination numerous other similar purchases for other customers on the same terms, and the commissions charged and retained by the bank for the service, for the purpose of showing that the transactions proven by the government were in the ordinary course of business, and were *bona fide* and for the profit and advantage of the bank, the Court, of its own motion, cut off the cross-examination, stating, among other things:

“ If they were in the ordinary course of business of the bank and were *illegal* and *in violation* of its by-laws [there was no by-law on the subject] or the statutes, it would not help matters if that practice was done. . . . If those transactions were of an *illegal* character, it would not help the present situation. . . . If these transactions that you are now attempting to show that Mr. Porterfield was carrying, and if he did carry them on, and Mr. Spurr knew it, I would say that their effect is neither enhanced nor impaired by the circumstance, if it should be shown that the bank was engaged in a like kind of business with respect to other customers.”

Rec., pp. 60-1.

Fifth: That the Court, although this evidence was ruled inadmissible “ for the purpose of affecting the question of *intent* ” of defendant in making the certifications for which he was being

tried, said to the jury, in the charge, concerning these transactions:

“The defendant is not on trial *directly* for his complicity with such previous speculations and misuse of the bank's property in them [by Porterfield], and proof of them has been admitted, and is to be applied by the jury *solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.*”

Rec., p. 78.

Sixth: That at another place in the charge, referring to these same transactions, the Court said, among other things:

“The using by its officers of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, *or any other persons*, is unlawful; their franchises do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it *legal*, nor can the opinion of other persons that it was proper, rightfully affect the view which the Court and jury must take of the legality of such practices. If the jury find from the evidence that *Mr. Porterfield* was engaged, with the knowledge of Spurr, in *thus* misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own *or other persons'* interest, the jury are at liberty to find *in that* a reason why Mr. Spurr *should not have confidence in Mr.*

Porterfield's integrity and fidelity to the interests of the bank," etc.

Rec., p. 63.

In this connection it is also to be noted that the record shows that there was proof that this bank "had been, since soon after its organization, acting as agent for its customers in making purchases and sales of stocks and bonds on New York exchange, charging commission for its service, and requiring customers for whom such purchases and sales were made to fully protect it by depositing sufficient cash or collateral securities or making notes; that this was known to and approved by the directors; that the income from commissions on such purchases and sales was large, and greatly swelled the general profits of the bank" (Rec., p. 55); and that defendant, for the security of the bank in all purchases made for him, delivered and pledged to the cashier, before the purchases were made, ample solvent securities for its full protection.

Rec., pp. 62-3.

These citations of the various actions and declarations of the Court concerning the evidence under consideration are made for the purpose of conveying as clear an idea as possible of the view which the Trial Court took of its scope, purpose, and effect, and to show the conflicting and inconsistent action of the Court on the subject.

Keeping in mind, now, what has been here shown, as well as what is said in the 8th paragraph of the petition, with the references to the record, it is apparent, first, that the transactions of 1886-7, disclosed by this evidence, were all more than five years before the certification of the Dobbins & Dazey checks by defendant, and more than four years before Dobbins & Dazey had any dealings whatever with the Commercial National Bank;

secondly, that no connection whatever was shown either of Dobbins & Dazey or of the certification of their checks by defendant with said transactions; thirdly, that said transactions, however *unlawful* they might have been, were not shown to be *fraudulent*; fourthly, that they were in no sort of sense *similar* transactions to those for which the defendant was indicted; and, fifthly, that they threw no light upon either the knowledge or intent with which defendant acted in the certification of the Dobbins & Dazey checks in December, 1892, and January and February, 1893, and hence could serve no purpose in the case except to divert the minds of the jury from the real question of defendant's guilt or innocence of the offense charged, confuse them with collateral and immaterial issues, and prejudice them against the defendant.

They should not therefore have been admitted, or, if admitted upon the statement of counsel that their fraudulent or criminal character and their connection with the offense charged would be subsequently shown, they should have been excluded from the jury when counsel failed to make good that promise.

The general rule which confines the evidence to the issues having been stated by Mr. Greenleaf, he adds, Vol. 1, Sec. 52:

“ This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.”

See also to same effect, the language of the Supreme Court in *Boyd vs. United States*, 142 U. S., 457-8.

In Rice on Evidence, Vol. 3, Sec. 30, it is said:

“ No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue; for where the person is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer.”

And again, in Section 153, it is said:

“ It is indeed elementary law, that no evidence can be admitted which does not tend to prove the issue joined, and the reason and necessity of the rule are much stronger in criminal than in civil cases, for the observation of this rule and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of evidence of another and extraneous crime, is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character.

“ The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or, indeed, of any character; but the in-

justice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."

In 1 Taylor on Evidence, Sec. 298, it is said:

"Such evidence tends needlessly to consume the public time, to draw away the minds of the jurors, and to excite prejudice and mislead, and moreover the adverse party, having had no notice of such evidence, is not prepared to meet it."

In the case of *People vs. Corbin*, 56 N. Y., 363, the Court said:

"Upon the trial of an indictment for forgery, evidence of admissions on the part of the prisoner of the commission of other forgeries is inadmissible and cannot be considered by the jury in determining the question of criminal intent."

See also *Coleman vs. People*, 55 N. Y., 81.

In the case of *Bonsall vs. the State*, 35 Ind., 462, the Court, in speaking of the admissibility of evidence of other offenses, said:

"This seems to us to have been a separate and distinct offense, and we know of no rule of law by which it was admissible in support of the indictment for the larceny alleged to have been committed on the 16th. It may have very seriously prejudiced the jury against the defendant, and induced them to find him guilty. It did not support the indictment, for the money was not of the same description as that described in the indictment."

In the case of *Smith vs. the State*, 10 Ind., 106, the Court said:

“Upon an indictment for larceny, evidence is not admissible to show that the defendant has a general disposition to commit that offense; nor that he had been guilty of a similar offense; much less that he had been guilty of a felony of a different character.”

The People vs. Barnes, 48 Cal., 551.

In the case of *Barton vs. State*, 18 Ohio, 221, it was held that, upon the trial of the prisoner for stealing a horse, evidence that he had on the night of the day previous to that on which the horse was taken stolen some money was inadmissible. In holding that such evidence was not admissible on the question of the prisoner's intent in taking the horse, the Court said:

“Although the Court in this instance say that the evidence was only admitted for the purpose of showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions that would enable any legitimate conclusion to be drawn as to that fact. The only conclusion we can see that could fairly be drawn from the evidence would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief and had just before stolen a sum of money. Each case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes.”

In the case of *People vs. Sharp*, 107 N. Y., 427, the defendant was indicted for bribery. In the trial of the case in the court below, evidence was allowed to be given on the part of the prose-

cution, under objection and exception, proving a corrupt proposal made about a year prior to the offense charged, by the defendant to an engrossing clerk of the Assembly, to pay said clerk five thousand dollars to alter a certain bill in reference to street railways, which said clerk then had in his possession, so that its terms might authorize the construction of a railroad on Broadway, in said city. It was held error.

The Court, in a very lengthy opinion (see pages 456-461), condemned such evidence as greatly prejudicial to the defendant, and quoted with approval the remarks of Allen, Justice, in the Coleman case (55 N. Y., 81) upon a similar question, where it was said:

“ It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging and prejudicial to the prisoner.”

And the Court, in the Sharp case, further said:

“ It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence.

“ It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty, it was absolute proof; but it was of a different crime than that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice and mislead them. It was, we think, improperly received, and the exception to its admission well taken.”

In the case of *State vs. La Page*, 57 N. H., 289, this whole question of collateral facts was very fully considered by the Court, and, among other things, it is said:

“ It is a maxim of our law that every man is presumed to be innocent until he is proved guilty. It is characteristic of the humanity of all the English-speaking people that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the Court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue.”

And the Court quotes approvingly the following language from the case of *Regina vs. Oddy*, 4 Eng. L. & E., 572, wherein it was said:

“ On an indictment for feloniously receiving goods, knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give any evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that these goods have been stolen from such owner.
. . . We are all of opinion that the evidence admitted in this case in regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it.”

In the case of *Shaffner vs. Commonwealth*, 72 Pa. St., referred to with approval in the case of *State vs. La Page*, cited *supra*, Agnew, J., among other things, said:

“To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one, must have done the other. Beyond this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a feasible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt.”

See also *State vs. Renton*, 15 N. H., 174.

In the case of *State vs. La Page*, cited *supra*, in 57 N. H., 302, the Court further say:

“It is always competent for the government to intro-

duce evidence of any facts tending directly to show the evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the defendant, or any necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible. (*Com. vs. Tuckerman*, 10 Gray, 198.) In that case the rule is laid down, that such evidence should have a peculiar and intimate, if not also an insuperable connection with, and tending to explain and characterize, the act in issue charged against the prisoner, and is only admissible on the question of intent."

And the Court laid down the proposition that—

"Evidence tending to prove collateral facts is admissible only when it has a natural tendency to establish the fact in controversy, or to corroborate other direct evidence in the case."

In the case of *State vs. Shuford*, 69 N. C., 486, the Court said:

"Evidence of a distinct substantive offense cannot be admitted in support of another offense."

In the case of *Coble vs. State*, 31 O. St., 100, the Court said:

"On the trial of a prisoner charged with an assault with intent to rape, it is error to admit testimony on behalf of the State tending to prove the defendant guilty of other assaults about the same time."

In the case of *the State vs. Boyland*, 24 Kan., 186, the opinion was written by Mr. Chief Justice Horton, and concurred in by

Associate Justice Brewer, now Associate Justice of the Supreme Court of the United States, and in that case the rule was announced, that—

“ You cannot prejudice a defendant by proof of particular acts of crime, other than the one for which he is being tried, unless the acts have been committed in the preparation for the crime or the actual doing of the crime, or in concealing it or its fruits.”

In the case of *Baker vs. People*, 105 Ill., 453, the rule is laid down, that—

“ Upon the trial of a party for one offense growing out of a specific transaction, evidence to prove a similar substantive offense, founded upon another and separate transaction, is not admissible.”

In the case of *Schaser vs. the State*, 36 Wis., 429, it was said:

“ On the trial of a person charged with a crime, it is error to admit, for the purpose of showing that he was probably guilty of the offense charged, evidence of facts tending to show that he was guilty, at another time, of some other crime.”

The Court in the opinion further said:

“ It needs no argument to show that testimony of this character was not relevant and pertinent to the issue, and that it was wholly improper to attempt to establish the guilt of the defendant in respect to the offense charged, by showing facts which tended to prove that he had probably committed another offense. And the effect of such evidence in poisoning the minds of the jury against the defendant is plain and inevitable.”

In all cases where evidence of other transactions has been admitted for the purpose of showing an evil intent, the courts have limited the introduction of such evidence to transactions immediately connected with the subject-matter of controversy. And, as said by the Supreme Court of Wisconsin, in the case of *State vs. Miller*, 47 Wis., 534:

“ It would require strong evidence to prove that crimes so dissimilar in purpose and intent were committed with a common purpose and intent, and therefore bear such relation to each other that proof of one would be proof of the intent of the other and bring the case within the rule, that offenses of like nature and intent may be given in evidence to convict of a subsequent crime, or to prove the intent of such crime, or as tending to prove such intent.”

The crime charged against the defendant is, that he *wilfully* and *unlawfully* certified certain checks of Dobbins & Dazey, drawn on the Commercial National Bank, at a time when *he knew* that there was no money on deposit with which to meet them. There can be no possible connection between such alleged offenses and the transactions of Porterfield and Spurr in 1886 and 1887; and that evidence could have served no purpose whatever, except to prejudice the jury against the defendant, and put him on trial for an offense for which he had not been indicted; and the error of admitting this class of evidence was greatly intensified when the Court told the jury, as it did in its general charge, that—

“ The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when

he made the false certifications of the checks mentioned in the indictment.”

Pr. Rec., p. 78.

In what possible way can it be said that because Porterfield may have engaged in the transactions of 1886 and 1887, that fact was even evidence *tending* to prove that Spurr had knowledge that Dobbins & Dazey had not sufficient means on deposit with which to meet the checks which he certified in December, 1892, and January and February, 1893? Is there any possible connection between the two transactions, such as would tend in the remotest degree to prove the knowledge or intention of Spurr at the time he certified the checks on account of which he has been indicted? The only effect of such evidence was to send the jury into the fields of speculation and conjecture, and divert them from the real issue being tried; or, as said by Mr. Chief Justice Horton, in the case of *State vs. Boyland*, cited *supra*:

“ The evidence objected to must have poisoned and inflamed the minds of the jurors, and greatly prejudiced the defendant.”

In the case of *Reg. vs. Oddy*, 5 Cox CC., 210, Lord Campbell, in substance, said that—

“ Under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer.”

And the rule seems to be generally established, in fact to be elementary, that where evidence of other transactions is admitted;

it is upon the theory that such evidence is so intermingled and connected with the evidence tending to show that defendant committed the crime charged as to form one entire transaction.

In the case of the *People vs. Jacks*, 76 Mich., 220, where this class of evidence was admitted by the Trial Court, the Supreme Court of Michigan said:

“The testimony objected to, and which was received by the Court, tended to make him a common thief, and of the class of goods of which the jury found him guilty of stealing. This could hardly have failed to have impressed the jury most strongly against the prisoner upon the charge in the first count; and it would be impossible for us to say that the subsequent charge of the Court, to the effect that the objectionable testimony could only be taken into account in considering the second charge, entirely removed such impression, or to what extent the rights of the respondent were prejudiced thereby; and in such case, as this Court has had occasion to say heretofore, the rule of safety requires that a verdict obtained under such circumstances should not be allowed to stand against the respondent.”

See also *People vs. Jenness*, 5 Mich., 305; *Lightfoot vs. People*, 10 Mich., 507; and *Com. vs. Campbell*, 155 Mass., 537.

In the case of *Commonwealth vs. Jackson*, 132 Mass., 16, it was said, speaking of the admissibility of evidence of collateral transactions:

“Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one imme-

diately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled principle of criminal law, that the general character of the defendant cannot be shown to be bad, unless he shall first attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.”

In the case of *Smith vs. State*, 17 Neb., 358, the Court said:

“As a general rule, the guilt of the accused, or his participation in the commission of another crime wholly unconnected with that for which he is put on his trial, cannot be admitted in evidence against him.”

In the case of *Cowan vs. State*, 22 Neb., 524, the Court said:

“On the trial of the cause, the State was permitted to introduce testimony to show that the accused had in two other cases, entirely distinct and separate from that under consideration, obtained goods under false pretenses. This was entirely unauthorized, and could not fail to be prejudicial to the accused.”

In the case of *people vs. Lane*, 100 Cal., 379, the Court said:

“As a general rule, evidence of a distinct and substantive offense cannot be admitted to show the commission of another offense, and this rule excludes all evidence of collateral facts, *or those which are incapable of affording a reasonable presumption or logical inference as to the principal fact or matter in dispute*; evidence of another offense cannot be given, unless there is some clear connection between the two offenses by which it may be logically inferred that if guilty of the one, the defendant is also guilty of the other.”

The Court, in this case, quotes with approval from Wharton on Evidence, Sec. 29, wherein it is said:

“ The reason of the rule is obvious. To admit evidence of such collateral facts would be to oppress the party implicated, by trying him on a case, for preparing which he has no notice, and sometimes by prejudicing the jury against him. In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes.”

In the case of *Farris vs. People*, 129 Ill., 521, in which this question was fully considered and many cases cited, the Court, after stating that testimony which is relevant to the issue is not to be excluded because it tends to prove the commission of another crime, said:

“ But the general rule is against receiving evidence of another offense, and no authority can be found to justify its admission, unless it clearly appears that such evidence tends in some way to prove the accused guilty of the crime for which he is on trial.”

The Court further said:

“ It is the general rule that in all cases, civil or criminal, the evidence must be confined to the points in issue; but there is a greater reason for strictly enforcing the rule in criminal cases than in civil cases.

“ No fact, which on principles of sound logic does not sustain or impeach a pertinent hypothesis, is relevant, and no such fact should therefore be admitted as evidence on the trial, unless otherwise provided by some positive prescription of law.

“ This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, for the reason such evidence tends to draw away the minds of the jurors from the point in issue, and excite prejudice and mislead them, and because the adverse party, having no notice of such evidence, is not prepared to rebut it. . . . To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who has committed the one must have done the other.”

In the case of *People vs. Hill*, Supreme Court of California, 34 Pac. Rep., 854, it was said:

“ On a prosecution for embezzlement, evidence that defendant two months after the offense charged in the information, embezzled another sum of money from plaintiff, is not admissible to show his intention in taking the first sum.”

In the case of *State vs. Bates*, reported in 15 Southern Rep., 204, the Supreme Court of Louisiana said:

“ It is a rule, subject to special exceptions, that when a person is on trial for one offense, evidence of another and extraneous crime is inadmissible. Such evidence is dangerous, and calculated to lead to conviction, upon a particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses in order to produce conviction for a single one.

“To make one criminal act evidence of another, a connection between the two must have existed, linking them together. If the Court does not clearly perceive the connection between the two offenses (as to the commission of both of which evidence is tendered), it should give in the special case the benefit of the doubt to the prisoner.”

For the purpose of showing intent or guilty knowledge, evidence of other offenses may be received; but under such circumstances the universal rule is that—

“To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish.”

In the case of *Beach vs. State*, 11 S. W. Rep., 832, the Court of Appeals of Texas said:

“On trial for theft, evidence of another theft committed by defendant, but not shown to have been committed at the same time and place, is inadmissible.”

In the case of *State vs. Kelly*, 27 Atlantic Rep., 203, the Supreme Court of Vermont said:

“On a trial for larceny, evidence of an accomplice, that after the return of himself and defendant to the latter's home with the stolen goods, they went out the same night and stole other goods, is inadmissible.”

In the case of *Whitlock vs. State*, 6 Southern Rep., 237, the Supreme Court of Mississippi, in passing upon the relevancy of evidence of this character, said:

“The general rule is, that the evidence must be con-

finer to the issue, and that on the trial of a person for a particular offense, the State cannot aid the proof against him by showing that he committed other offenses. The reason and justice of the rule is apparent. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them; and the defendant, being informed by the charge against him that he is to be tried for a specific offense, is not prepared to defend against other offenses. 'To admit such evidence,' says Bishop, 'would be to put a man's whole life in issue on the charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet.' "

Numerous other cases on the subject are cited and quoted in 3 Rice on Ev., Chap. 25, Secs. 153-158, to which attention is invited.

A careful consideration of the authorities therein and herein cited will, we believe, demonstrate that there was error in the admission of this evidence.

The 17th assignment of error is of the same character, but relating to certain personal accounts of speculative transactions, not connected with the bank; but it presents the same legal question, to which the foregoing argument is equally applicable, and need not be discussed further.

VI.

RULINGS OF THE COURT UPON THE EFFECT OF
COLLATERAL MATTERS.

Of a kindred nature to the question just argued is that stated generally in the above heading. Some of the rulings here referred to were stated in the 5th division of this argument. That which contains the instruction to the jury upon the *illegality* of the cashier's dealing in stocks, etc., in the name of the bank, for its customers, and the effect thereof upon defendant's right to rely upon the cashier, has already been quoted, and is the basis of the 13th assignment of error.

Rec., p. 19.

Others will now be cited, but it is proper first to call attention to the following facts appearing by the record:

First: That there was evidence tending to show, and from which the record recites the jury might have found, that defendant did not at any time purchase through the bank any stocks jointly with Porterfield; that defendant did not know that Porterfield was purchasing stocks through the bank, or that he was speculating in the name of the bank, or that he was using its funds in speculations, either for himself or others, without the bank being first amply secured by the deposit of funds or collaterals; that defendant believed Porterfield was honest, truthful, and faithful to the bank, and was fully protecting its interests in all matters under his control as cashier; and that he and all the officers and directors of the bank relied implicitly upon Porterfield's statements respecting its affairs.

Rec., p. 62.

Second: That there was evidence tending to show, and from which the record recites the jury might have found, that defendant had no knowledge of the overdraft of the Dobbins & Dazey account; that he did not have charge of the account, nor of any of the books of the bank, and that this account was never referred to him for any purpose; and that in making the certifications of the checks of Dobbins & Dazy, he acted, in good faith, upon information given him at the time, either by the cashier, Porterfield, or the exchange clerk, that ample funds were on deposit to meet the checks, which information he believed to be true.

Rec., pp. 31-2; 46-7.

Third: That there was no evidence offered by the government to show that the parties for whom the bank, through Porterfield, made the stock purchases in question, of 1886-7, did not furnish means to secure and protect the bank against loss in respect to them, nor that the bank sustained any loss whatever by them (Rec., p. 61); but, on the contrary, the government contented itself with proof that such purchases were made, commissions charged for them, and exchange sent on to New York by Porterfield to the brokers to cover them. Whether the parties for whom the stocks were bought furnished the money to the bank or not was apparently deemed wholly immaterial by both the Court and counsel for the government.

Now, in this state of the case, defendant asked the Court, by the 13th special request, to instruct the jury, in substance, that although a national bank had no authority by law to receive and execute orders for such purchases as were shown in this case, yet if it was done with the approval of the directors and for the profit of the bank in commissions, and the bank was fully secured, and the defendant had no knowledge of, or reason to suspect, the *unfaithfulness* or *dishonesty* of the cashier in his conduct of such transactions, he "ought not to be prejudiced, *in this case*, by the

fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account if he secured the bank amply with his own means as other customers were required to do."

Rec., pp. 63-4.

This instruction was refused, and its refusal is the basis of the 14th assignment of error.

Rec., pp. 19-20.

Defendant also asked the Court, by the 10th special request, to instruct the jury, in substance, that if defendant relied upon the statements of the cashier as to the condition of the Dobbins & Dazey account, in good faith, believing those statements to be true, he would have the right to do so "if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and *truth*." The Court granted the instruction after striking out the word "truth," and substituting therefor the words, "right conduct as respects the bank's affairs."

Rec., p. 64.

To this modification defendant excepted, and it is the basis of the 15th assignment of error.

Rec., p. 20.

Changes of the 11th request for special instructions, made the basis of the 16th assignment of error, indicate the same conception or idea in the mind of the Court, namely, that it was not the known or supposed *truthfulness* or *honesty* of the cashier that was the test of defendant's right to rely upon his statements, but his *right conduct* in respect to the bank's affairs, in the sense of *lawful* conduct; for in the 11th special instruction the change made by the Court was, in part, to strike out the word "dishon-

estly," and substitute for it the words, "*unlawfully* in respect to its affairs."

Rec., p. 65.

Recapitulating briefly the rulings of the Trial Judge on this subject, we have the Court's position and view upon it shown—

First: By his statement when the evidence was admitted that it was competent "as affecting the question of respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action or honesty of purpose."

Rec., p. 56.

Second: By his subsequent ruling, during cross-examination of a witness, that such purchases being *unwarranted by law*, the fact that they were in the ordinary course of the business of the bank and for its benefit was not material and "would not help matters."

Rec., pp. 60-1.

Third: By the direct charge quoted in previous division of this argument, to the effect that such transactions are *unlawful* and an *abuse of the lawful powers of the bank*, and that if the defendant had knowledge of such *violation of law* by Porterfield, the jury might treat *that* as a ground for denying him the right to rely on Porterfield's statements concerning the Dobbins & Dazey account.

Rec., p. 63.

Fourth: *By the refusal* of the 13th special instruction, to the effect that if defendant acted honestly in the matter, and had no knowledge of, or reason to suspect, the unfaithfulness of the cashier, and these *unlawful* transactions were authorized by the directors, the defendant ought not to be prejudiced, *in this case*,

by the fact that the bank conducted such business, notwithstanding it may not have been within the lawful powers of the bank.

Rec., pp. 63-4.

Fifth: By striking from the 10th special instruction the word "*truth*," and substituting "*right conduct* as respects the affairs of the bank;" and by striking from the 11th special instruction the word "*dishonestly*," and substituting "*unlawfully* in respect to its affairs."

Rec., pp. 64-5.

Now we maintain that each and every one of these rulings of the Court was erroneous, and that the idea which underlies and pervades all of them is an essentially erroneous conception of the law applicable to this subject in a criminal case.

It is beyond doubt that this idea of the learned Trial Judge, thus put forth in so many forms, was that the defendant's knowledge of the *technical violation* of the national banking law by the cashier, in acting as agent for the customers of the bank in purchasing stocks on margin, however honestly and innocently, and however faithfully he might thereby be serving both the wishes of the directors and the interests of the bank, would *deprive the defendant* of the right to rely on anything the cashier might say concerning the affairs of the bank under his special charge; and such, unquestionably, was the impression he left upon the minds of the jury.

The evident purpose was to induce the jury to find that although the defendant *honestly acted upon the cashier's statements* that the necessary funds were on deposit, *in the belief that such statements were true*, yet, nevertheless, as he knew the cashier had acted *unlawfully* in making purchases in the name of the bank which by law the bank *had no power to make*, he was to be

deprived, or might be, by reason of this fact, of the *right to rely* on the cashier's statements, though wholly disconnected with the "illegal" transactions, and in this way the proof of defendant's *actual innocence* and *honesty* be gotten rid of and the defendant placed in an attitude to be *charged with a knowledge* which the proof showed he did not possess. It was an effort, in other words, to bring the defendant within the doctrine of certain cases which hold that wilfully and designedly shutting the eyes to obvious facts is equivalent to knowledge of those facts—a class of cases which we do not question when properly applied.

Our contention was, and is, that the defendant could not be deprived of the right to rely upon the cashier's statements in respect to this Dobbins & Dazey account unless it was shown that he had knowledge of the cashier's *untruthfulness*, *dishonesty* or *want of integrity*, or his *unfaithfulness to the bank*; and that his knowledge of such a *technical violation* of the lawful powers of the bank as that put by the proof and instructions of the Court would no more have that effect than would knowledge of the fact that the cashier had loaned money at excessive rates of interest; or had loaned more than one-tenth of the capital stock to one person, firm or corporation; or had made loans on real estate as security, or the like—in fact, the latter acts would be the more serious violations, for they are *expressly forbidden* by law, while acting as agent for the purchase of stocks and securities on margin is not expressly forbidden.

Our position is well sustained by the authorities, and none have been cited to the contrary by the government at any time in the many trials of this case.

Said Lord Moncreiff in the Trial of the Directors of the City of Glasgow Bank, pp. 433-4:

"A director is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker, as we all know. He is a man selected from his position, from his character, from the influence he may bring to bear upon the welfare of the bank, and from the trust and confidence which are reposed in his integrity and in his general ability. But I need not say that it is no part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials of the bank who are there for that purpose, and as long as he has no reason to suspect the *integrity* of the officials, it can be no matter of imputation to him that he trusts to the statements of the officials of the bank acting within the proper duties of the department which has been entrusted to them."

Said Vice Chancellor McCoun, in *Scott vs. De Peyster*, 1 Edw. Ch., 513-4, cited in *Briggs vs. Spaulding*, 141 U. S., 162, referring to the president and directors of moneyed institutions and their secretary, cashier, or other subordinate agents:

"While engaged in the performance of the general duties of their station, they (the subordinates) must be supposed to act *honestly* until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of *integrity*, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued."

This is laid down as the measure of responsibility in a civil action where only pecuniary liability is involved. Certainly a more rigid rule ought not to be applied in a criminal case involving the liberty of the citizen.

Again, on the same subject, the following language of Judge Earl, in *Wakeman vs. Daley*, 51 N. Y., 27, was quoted with approval by Chief Justice Fuller in *Briggs vs. Spaulding*, 141 U. S., 163:

“The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no *fraud*, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their *fidelity*. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.”

The case upon which the government has always specially relied in these trials, on this point, is that of the *United States vs. Graves*, at the circuit, reported in 53 Fed. Rep., 634. The paragraph of the charge of Judge Woolson on this point will be found on page 658, and is as follows:

“Notice, gentlemen, that in all the instances I have named I have given prominence to the fact of knowledge in the person doing the act. I do not mean that a man can be convicted of the crime charged in this indictment

for mere negligence, careless action. Speaking generally, I may say that, if the director making the false entry was in fact ignorant of the condition of the bank, and did not know its resources and liabilities, however recreant he might be to the position he held and the duties devolving upon him, and whatever other liabilities, civil or criminal, he might thereby be subject to, he could not be convicted under the section on which this indictment is based; and yet I ought to add that this does not in any wise justify or authorize a director to purposely, wilfully, and knowingly close his eyes and his ears to the facts around him, or which lie directly in his path, for the purpose of making it easier to those engaged in plundering or wrecking a bank. Let me illustrate my meaning: If a director of a national bank, knowing that those in charge of or actively managing the bank are *despoiling it, robbing its treasury*, knowing that the funds of the bank are being *dissipated, improperly withdrawn from the bank*, and worthless paper (miscalled 'securities') is being substituted instead thereof—if, *thus knowing*, such director *refuses to accept* the information lying directly across his path, and *purposely* keeps himself in ignorance or refrains from taking active part in the bank's management, that he may thereby permit such transactions to go undisturbed or undetected, and he then lends the credit of his name, puts his signature to untrue and false reports connected with the condition of the bank *for the purpose of enabling such a fraud to go undetected*—in such a case it will be no shield to him to show that he had no knowledge of the truth or falsity of the report he has signed. To hold otherwise would be to make the law go hand in hand with rankest injustice, to legalize robbery, to make our temples of justice modern cities of refuge, and our courts encouragers of what plain people properly call crime."

Now by all these authorities—and none going further have been produced by the very able counsel for the government—the thing which is to arouse suspicion of their subordinates on the part of the superior officers and directors is the *want of integrity* of such subordinates, however the idea may be expressed. And this, too, even in a civil action. If we are to be guided by the Graves case, most relied on by the government—a criminal case, too—then the directors or superior officers must *know* “that those in charge of or actively managing the bank are *despoiling it, robbing its treasury*, that the funds of the bank are being *dissipated, improperly withdrawn from the bank,*” etc.

The position of the Court on this question affords one of the many illustrations of the dominant erronecus theory that permeates the whole case, as will be seen further on, namely, that the defendant might be convicted upon a lot of *inferences* and *presumptions* arising from his *duty* and from extraneous circumstances having no relation—certainly no obvious or proven relation—to the crime charged, and in this way the burden of *proving* the facts essential to guilt be obviated.

VII.

GUILTY KNOWLEDGE AND INTENT, AND THE IN-
FERENCE OF KNOWLEDGE FROM DUTY
AND FROM THE CONTENTS OF THE
BANK'S BOOKS.

Under this heading may be treated the 5th and 6th subjects stated, generally, at the beginning of this argument.

The Trial Judge, in the charge, *defined* the offense as follows:

“The government is bound, in order to maintain any of the counts in these indictments, to prove:

“First: That the defendant certified the check.

“Second: That the drawers of the check had not sufficient funds in the bank to meet such check.

“Third: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.”

Rec., p. 50.

This clause of the charge is the basis of the 6th assignment of error.

Rec., p. 15.

The succeeding paragraphs of the charge, embodying the explanation and modification referred to, were as follows:

“Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawers was overdrawn when these

certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

“ The knowledge of the defendant of the state of Dobbins & Dazey’s account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the Court charges you that it is not necessary for the government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey’s account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey’s account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check, and that there was no warrant for marking the check ‘ Good,’ that was sufficient.”

The Court then, after a paragraph not excepted to, and containing nothing in the way of a definition of the offense, proceeded to say:

“These checks, before their certification, were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. *It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it; but the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty.*”

Rec., pp. 149-150.

The portion in Italics is the basis of the 1st assignment of error.

Rec., p. 13.

Subsequently, after granting the 2d special instruction asked by defendant, construing By-laws 8 and 9 relative to the duties and responsibilities of the president and cashier (pp. 38-9) to the effect, among other things, that these by-laws required that these officers should each “faithfully and honestly” discharge their respective duties, the Court added:

“But the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and I further charge you that *when the president assumed to certify these checks as*

good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

To this modification exception was taken, and it is covered by the 5th assignment of error.

Rec., pp. 14-15, 39.

The 4th special instruction was also subsequently refused, and which was as follows:

"If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier, and not to the president, and that the cashier was directed by the Executive Committee of the bank to look specially after the account of Dobbins & Dazey, and that it was not at any time referred to or placed in the hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that the account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."

This refusal was excepted to, and is the basis of the 3d assignment of error.

Rec., pp. 13-14, 33.

The Court also refused the 9th request for special instructions, which was as follows:

"The defendant's want of knowledge of the state of the account of Dobbins & Dazey, at the time he certified the checks, will be a complete defense to him, unless you are

satisfied beyond a reasonable doubt that such want of knowledge *proceeded from a will to disobey the law or from an indifference to its commands.*"

This refusal was excepted to, and is the basis of the 10th assignment of error.

Rec., pp. 17, 52.

After charging the jury, as stated in the quotation above, to the effect that they might *infer* defendant's knowledge of the state of the account *from his duty to know it*, but that *the presumption* was not conclusive, and that *he might show, if he could*, that he did not, *in fact, acquire information of the truth*, the Court used the following language (p. 98), already quoted in another connection:

"Nevertheless, he [referring to the defendant] testified that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn, or that there was too small a sum to their credit to meet them.

"Gentlemen, do you think this is true? It is for you to say; and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."

The Court also refused the 6th special instruction, to the effect that it was incumbent on the government to show that the defendant *actually knew*, at the time he certified the checks, that the drawers had not sufficient funds in the bank to meet them, "and that he certified them *wilfully and with such knowledge.*"

Rec., pp. 33-4.

This refusal was excepted to, and is the basis of the 4th assignment of error.

Rec., p. 14.

We cite these several actions of the Court together because they color and reflect upon each other, and because each tends to show, and all together conclusively show, what we submit was the fundamental error that dominated the mind of the learned Trial Judge throughout the case, and by which alone the government was enabled to obtain a verdict, namely,

That guilt might be established, in some round-about way, by inference from the defendant's duty under the law and the by-laws of the bank, and from the contents of the bank's books, without showing any actual, conscious guilty knowledge, or any wilful or fraudulent avoidance of knowledge, or any bad intent or purpose on the part of the defendant on trial.

In other words, that the Court erroneously applied to the case the rules and principles of *civil* responsibility, and not those of the *criminal law*.

1. Now the Court, in the first above-quoted extract from the charge, undertook to *define* the offense as consisting of (1) certification, (2) want of funds, and (3) knowledge of want of funds, adding that the third element of the offense would be "explained and its modification stated further on."

Our objection to this definition is that it omits or ignores the essential *bad intent* of the act, declared by this Court in *Potter vs. United States*, 155 U. S., 438. The learned Court of Appeals concedes that this objection would be good "if the instruction had been submitted as *complete in itself* upon the essentials of the crime, and as *dispensing with the necessity of proof of the intent which accompanied the act of certification.*"

Rec., p. 115.

But the Court adds:

“ But the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the 6th request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge *and intent*.”

Rec., p. 115.

If this answer to our objection is well based in point of fact, then, of course, there is nothing further to be said.

Inasmuch as this position of the Court of Appeals is the only one for which the government has contended on this point, and as it conceded in its opening statement and throughout the trial, as the record abundantly shows, the necessity of proof of the *bad intent* implied by the use of the word “ wilfully ” in the statute, this question as to the omitted essential of the offense being supplied subsequently in the promised explanation and “ modification of the third element,” is vital to the case and deserves full consideration.

Now this position of the government and of the Court of Appeals, simply and fairly stated, seems to be this: That the instruction criticised gives a definition of the offense which is defective and erroneous as it stands, unless there is added, in the promised *further* explanation and modification, a definition or declaration of the *intent* with which the act was done, superadded to *knowledge of the want of funds*, which *intent* is an essential part of the crime, and must also be proven to warrant conviction.

Let us, then, inquire whether this omitted essential element of the offense is subsequently supplied. We confidently maintain that it is not; and that, on the contrary, the Trial Judge *did not*

purpose or intend by his promised explanation and modification to add any such further element or feature as essential to the offense; but his purpose was to modify and minimize the element of *knowledge*, and to relieve the government of the necessity of proving even that.

It will be observed, first, that the learned Trial Judge does not, in the definition quoted, suggest that there is any *additional* element of the offense beyond the three elements stated; and, we submit, the whole charge will be searched in vain for any such suggestion. He divides the offense into *three* elements, and suggests that the *third* is subject to an *explanation* and *modification* to be stated further on. It is doing violence to the language of the learned Judge to say that he did not mean what he said—that *three* things were to be established to warrant conviction, *one* of which was subject to a certain *explanation* and *modification* which would be given later on. This is the plain meaning of his language, and it cannot be argued away.

Secondly. It will be observed from the succeeding paragraphs of the charge that the learned Judge, after stating that the first and second elements of the offense are not denied, and that the third is denied, adds: "The *knowledge* of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case." Why *pivotal question*, if not the *only* disputed question upon which the right to convict turned? Here, again, we get a clear insight to what was in the mind of the Court, as well as to the meaning his language carried. It was equivalent to saying to the jury: The *whole case* depends on whether the defendant *had knowledge* of the state of the account when he certified these checks; *if he had such knowledge, you may convict him*, as he does not deny that he certified the checks, nor that the funds were, in fact, wanting.

It would seem unnecessary to go further to find that this is what

the Court really meant, and this is certainly the plain and natural meaning of his words.

But did he, in fact, go further and add the omitted element, *intent*, in his promised further instructions, or did he simply *modify* and *explain the element of knowledge*?

The Court then takes up his promised modification and explanation in the very next paragraph, beginning with the words, "*Upon this question of knowledge* the Court instructs you," etc., quoted fully above, and tells the jury, in substance, that it is *not necessary* for the government to show knowledge directly; that if defendant "knew that he had good reason for believing" the account overdrawn, and refrained from making inquiry, etc., "*that is sufficient*;" that "if he shut his eyes to what he believed was the fact, and kept himself in ignorance," etc., "this would be *equivalent to express knowledge*;" that it was *not necessary* to prove that he knew the extent of the overdraft, etc.; that "if he knew of the substance of the fact," etc., "*that was sufficient*."

Sufficient for what was all this? Undoubtedly, sufficient to *charge* the defendant with *knowledge of the want of funds*, and meet the requirement of the government as to the third element of the offense, although the government should not be able to show actual knowledge.

Now this is, in fact, what the Court promised—an *explanation* and *modification* of the "last element of the offense;" and the obvious purpose and effect of it was to *relieve* the government of the burden of showing directly actual knowledge, as might be implied from the original definition of the offense unexplained and unmodified. Instead of adding to the burden of the government the necessity of *proving a criminal intent*, superadded to knowledge of the want of funds, the promised modification *relieves* the government of the necessity of proving, directly, even that knowl-

edge, and *explains* to the jury how *that fact* may be shown *indirectly, constructively, and by inference or presumption.*

That this is all of the charge that was meant and intended by the Court as a modification of the "last element of the offense" we think cannot admit of doubt; but the Court of Appeals, in their opinion, say the promise of the Trial Judge to add the omitted element of *intent* was fulfilled in the passages in the charge quoted in its review of the 6th request. (Rec., p. 115.) That learned Court quotes in its review of the 6th request the paragraph herein above quoted, giving the equivalents of knowledge, and also the following additional extracts:

(1) "The government is bound, in order to maintain any of the counts in the indictment, to prove: . . . 3d, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them [the checks]."

(2) "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment, before you will be warranted in convicting him."

(3) "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

(4) "And, in general, if the defendant acted in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

(5) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly, and in bad faith [these words mean substantially the same thing] shut his eyes to the facts, and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

Rec., pp. 112-114.

It must be obvious to the Court that these latter extracts from the charge and special requests granted did not, and were not intended to, supply the omitted essential of criminal *intent* in the act of certification. They are, for the most part, fragmentary excerpts, in no way connected with the Court's definition of the offense charged. The first is simply a part of the definition under criticism; the second, simply a general statement that the essential facts must be proven beyond a reasonable doubt, and is taken from the latter part of the defendant's 16th special request (Rec., p. 154); the third, similar to the second, is taken from the concluding lines of the charge (Rec., pp. 156-7); the fourth is a segregated extract from a paragraph of the charge to the effect that the jury might infer defendant's knowledge of want of funds from his duty to know the state of the account, elsewhere criticised (Rec., pp. 149-50); and the fifth is the defendant's 8th special request, modified and granted (Rec., p. 153).

And so, it is confidently insisted, the learned Circuit Judge neither intended by his promised explanation and modification of the last element in his definition of the offense to add the omitted criminal *intent*, nor did he do so in any part of the charge. This

will be still more apparent, as we proceed, from other statements and declarations in the charge and in the action of the Court on special requests, showing that he *did not regard any criminal intent necessary*.

2. The instruction quoted and Italicized at the beginning of this division of the argument, as the basis of the 1st assignment of error, came almost immediately following the definition of the offense just commented on. This was to the effect, as has been seen, that from the existence of the *duty* of the defendant to *know the state of the account* before certifying the checks the jury might draw the *inference of fact that he did know it*, but that this "*presumption of knowledge*" was not an *absolute* one—that the *defendant might show*, if he could, that he did not, *in fact, acquire information of the truth*.

This, as we shall presently attempt to show, was an unwarranted shifting of the burden of proof, as to knowledge, from the government to the defendant, and an application to the case of a rule or principle which obtains only as to civil responsibility, and has no place in the criminal law.

But it is proper to notice, in the same connection, the three succeeding quotations from the record, indicating similar action of the Court, involving a similar misconception of the law, and intensifying and emphasizing the error complained of in the 1st assignment.

The purpose of the 2d special request, as will be most manifest from a reading of the record, was simply to have a construction of By-laws 8 and 9, defining the duties and responsibilities of the president and cashier, in corroboration of the evidence offered on behalf of defendant to the effect that it was understood and agreed from the first that *he* was not to have charge of the books, accounts, and details of the bank, but was to look only after out-

side matters and such as might be specially referred to him, and as tending to make reasonable his contention that he did not know the condition of the accounts on the books; that it was not his duty, as he understood it, to look after them; but that it was the cashier's duty, and the president was well warranted in relying upon inquiries made of the cashier as to such details. This was most obviously the only purpose of this request; but the Court, after granting it and stating its conclusion that these by-laws required of these officers "to faithfully and honestly discharge their respective duties," added:

" . . . When the president assumed to certify these checks as good, the *faithful and honest* discharge of his duties *required* him to be informed of the condition of the account on which they were drawn."

This could not be otherwise understood than as equivalent to saying that the very by-laws of the bank *held the defendant to knowledge of the condition of the account* when he *assumed to certify checks drawn upon it*.

And so, thus far, we have the Court saying, first, that it was the defendant's *duty*, presumably under the law, to know the condition of the account when he certified checks drawn upon it, and that from that duty the jury might *infer that he did know it*—leaving to the defendant the privilege of showing, if he could, that he did not, *in fact*, know it; and, secondly, that the faithful and honest discharge of his duties, exacted by the by-laws of the bank, *required him* to know it.

And then, when the defendant asks a special instruction (the 4th), to the effect that if the details of the bank were entrusted specially to the cashier, and not to the defendant, and the Dobbins & Dazey account was not at any time referred to defendant nor his attention called to it, and he was assigned to other duties,

then *no inference of his knowledge of the state of that account* should be drawn *from the mere fact that it appeared on the books to be overdrawn*, for knowledge of the contents of the books *could not be imputed to the defendant simply because he was president or director*, the Court refuses the instruction.

And, again, when the defendant asks an instruction (the 9th), to the effect that his *want of knowledge* of the state of the account would excuse him, unless such want of knowledge proceeded from a *will to disobey the law*, or from an *indifference to its commands*, the Court *refuses that*.

And, finally, on this point, after having told the jury that the defendant *might show*, if he could, that he did not, *in fact*, acquire information of the truth, and in that way *rebut the presumption* which they were authorized to draw *from his duty to know it*, the Court says to them that defendant has testified that he did not know it, and adds, with ominous significance:

“Gentlemen, *do you think this is true?* It is for *you* to say; and as *you* are responsible for the answer, *I* shall do no more than *challenge your serious attention to the evidence in the case touching this question.*”

Now with the greatest respect for the learned Circuit Judge, we submit that the annals of criminal trials in modern times will be searched in vain for a more striking example of *unfairness*, to say nothing of the apparent negation and nullification here exhibited of the humane doctrine of the criminal law which holds the *intent*—the conscious guilty knowledge and purpose, the heart devoid of social duty and bent on mischief—the chief element of crime.

On the essentiality of a bad intent, a purpose to do wrong, as an element of the offense charged in this case, the case of *Potter*

vs. United States, 155 U. S., 438, is deemed sufficient. Referring to the meaning of the word "wilfully" as used in the Act of Congress of 1882, the opinion in that case says:

"It implies on the part of the officer knowledge *and a purpose to do wrong*. *Something more* is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact *or without any purpose to evade or disobey the mandates of law*."

The opinion quotes approvingly other authorities holding that the word "wilfully" in criminal statutes implies "*a determination with bad intent*;" "not merely voluntarily, but *with a bad purpose*;" "*an evil intent* without justifiable excuse;" and that "*the gravamen of the offense consists in the evil design*."

The same principle is declared in many other authorities. It is most excellently stated by Lord Moncreiff in the Trial of the Directors of the City of Glasgow Bank, which was an indictment for signing and publishing certain false statements or balance sheets of the bank, *knowing them to be false*—the word "wilfully" not being used. At page 82 of the report of the trial the following language occurs:

"My general opinion upon the matters submitted for discussion yesterday is, that it is not every violation or excess of the rights of directors or persons in that position of trust which will ground a criminal prosecution. It may quite well be that directors violate the conditions on which they hold their office by doing acts which are not sanctioned by the terms of their appointment. Such cases occur every day in the civil courts; and if directors in that position act beyond their powers, or in violation of their powers, they will be responsible in the civil consequences, and their acts will not have the validity of

legal acts of the directors. But before this can be raised into a criminal offense, and be the subject of a criminal indictment, there must be superadded to the illegality of the act—the invalidity of the act—some element of bad faith, some corrupt motive, some guilty knowledge, some fraudulent intent, which shall raise that which, although illegal, was not a crime, into the category of a crime. These are familiar and elementary principles; and in cases of that kind the corrupt motive, the bad faith, is essential to the crime itself, and without it there is no crime.”

In the case of *Pierce vs. Hanmore*, 86 N. Y., 103, in speaking of the obligations of an officer who was charged with signing a report “knowing it to be false” within the meaning of the statute, the Court said:

“To charge the officer with the severe penalty imposed, by signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made *in bad faith wilfully*, or for some *fraudulent purpose*, and not ignorantly or inadvertently.”

And the Court further remarked in this case:

“When the knowledge of the trustee is not directly proven, but is a matter of inference, the existence of a guilty motive or purpose may be material to establish the scienter. In determining whether the statute has been wilfully violated, something more must be shown than a want of strict compliance with its terms. . . . The statute is highly penal. It subjects the offender to all the debts of the company contracted while he is a stockholder or officer, without regard to the amount of his stock, and without any right of contribution, such as is provided for in the case of an entire omission to make a report; and we think it is intended to punish, not a mere act of negligence

or ignorance, but only an *intentional misrepresentation*. It contemplates that erroneous reports may be made, but punishes only the officers who sign them knowing them to be false."

In the case of *Stebbins vs. Edmonds*, 12 Gray, 203, which was an action for making a false certificate that the capital (\$130,000) had been paid in, it appeared that only \$40,000 had been paid in cash, and \$90,000 of stock had been issued in part payment for an exclusive license under a patent. The Supreme Court, upon the words of the statute, "knowing it to be false," observed that it was not enough to show that the certificate did not contain the exact truth, according to the strict legal interpretation of the statute, but it must be made to appear that it was *wilfully* false; that is, *made intentionally and with a purpose to deceive*, and that the *scienter* or guilty knowledge intended by the statute must be equivalent to *malā fides* in making the certificate.

Sec. 5208, Revised Statutes, providing that it shall be "unlawful" for any officer, etc., to certify, etc., and the Act of 1882 providing that it shall be a misdemeanor to "wilfully" violate that section, it is manifest that the certification to be criminal must be done both "unlawfully" and "wilfully" as these terms are interpreted by law; and hence the meaning of both words must be kept in view.

The word "unlawfully" is not equivalent to "wilfully." *State vs. Hussey*, 60 Me., 410; *Rex. vs. Davis*, 1 Leach, 556.

In *Reg. vs. Fife*, 17 Ont., 710, it was held that where an offense must be "unlawfully" committed, to charge that it was "wilfully" committed, omitting the term "unlawfully," was fatal.

In *State vs. Massey*, 97 N. C., 465, the Court said:

“ The term ‘ unlawfully ’ implies that an act is done or not done as the law allows or requires; but the term ‘ wantonly ’ implies turpitude—that the act is of wilful, wicked purpose. The term ‘ wilful ’ implies that the act is done *knowingly and of stubborn purpose*, but not of malice.”

What is by all these authorities treated as the *gravamen* of the crime—the purpose to do wrong, purpose to evade or disobey the mandates of law, bad intent, bad purpose, evil intent without justifiable excuse, evil design, corrupt motive, fraudulent intent, of stubborn purpose—however characterized, was ignored by the learned Circuit Judge in his definition of the offense in this case and in his entire charge and conduct of the trial. It seems to have had no place in his conception of the law of the case, and this fact crops out continually in his action and rulings throughout the whole trial.

The other rulings of the Court cited in this division of the argument are founded upon the same error.

The instructions that the jury might *infer* knowledge from defendant's *duty* to know; that the by-laws *required* him to know; the refusal to instruct that knowledge of the contents of the books could not be *imputed* to defendant because he was president or director; and the refusal to instruct that *want of knowledge* would excuse unless it proceeded from a *will to disobey the law* or from an *indifference to its commands*—all point to what we have suggested was a gross misconception of the law applicable to this case, and an attempt to apply to it the rule of mere *civil* responsibility.

Now we do not insist that it was not the duty of defendant to inform himself of the condition of the account; we concede that it was his duty to do so; but, in this connection, fairness to the defendant requires the fact to be kept in mind that the record shows he attempted to perform this duty and thought he had done so.

But what we do complain of is the *evidential effect* which the Court gave to that duty in the charge.

That effect was, to *place upon the defendant the burden of proof which the law casts upon the government* in reference to the essential *fact* of knowledge of the state of the account.

In other words, that the Court erroneously operated the defendant with the burden of *disproving* a fact essential to his conviction, *which had not been proven by the government*, and which in its nature could only be disproven by defendant's *own testimony*, and then, to intensify that error, vigorously challenged that testimony—in effect, *told the jury to disregard it*.

The Court will observe that the charge in question is not an application of the rule that the natural and probable consequences of an act, *knowingly and intelligently done*, will be presumed to have been *intended*. This rule and the presumption in such cases we concede. Without them, unlawful intent could scarcely ever be established. But that is not the question here, nor the meaning of this instruction.

On the contrary, the instruction is to the effect that the jury may infer or presume *the fact of knowledge*, which is the essential *prerequisite* of unlawful intent, from the mere *duty* of the defendant.

Now the defendant's *duty* was not, properly speaking, a *fact* at all, but a *relation* arising from certain rules of law or of the bank appertaining to the office of president and the defendant's occupancy of that office; and yet this instruction authorizes the jury to infer, from such *relation*, the *fact of defendant's knowledge* which it was incumbent upon the government to establish by proof; and the only escape of defendant was the poor privilege, which was afterwards substantially withdrawn from him by the

Court, of showing, if he could, that he did not, *in fact*, have such knowledge.

In other words, the effect was to authorize the jury to *infer the only disputed fact considered essential to guilt* from a mere *relation* of defendant, itself a mere *inference* of the Court from the law and the rules of the bank, and thereon to base a verdict of conviction, *unless* the defendant should overturn this fabric of *inference upon inference* by proving his ignorance *as a fact*.

We respectfully submit that such a method of establishing the guilt of a citizen of a grave crime is intolerable and utterly abhorrent to the moral sense.

Note carefully the language of the instruction:

"It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. *From the existence of such a duty you may draw an inference of fact that he did so inform himself*, if he did not already know it. But the *presumption of knowledge* is not an *absolute* one, and *the defendant may show*, if he can, that he did not, *in fact*, acquire information of the truth."

The Court had just told the jury, as has been seen, that all the essentials of the crime, according to his definition of it, were admitted—or, rather, not denied—except that of knowledge of the state of the account. Now he tells them that it was defendant's *duty to have this knowledge* before making the admitted certifications, and that *from that duty* they may *infer* that he *did have that knowledge*.

This is the plain meaning of the instruction; and if the suggested *inference* should be drawn, the case would stand made out, and that, too, without any proof at all on the *only* disputed fact in the case.

But, the Court further says, this *inference* or *presumption of knowledge* is not an *absolute* one, and *the defendant may show*, if he can, that he did not, *in fact*, have the knowledge.

Plainly and simply stated, the instruction comes to this: The knowledge of the defendant is the only fact denied which need be established in order to maintain the indictment, the others being admitted; you may *infer* this disputed fact from a *duty* of defendant, which I charge you exists, and, therefore, convict him, *unless he shows*, which he may do if he can, that, *in point of fact*, he did not have knowledge. In other words, he may overturn this *presumption of knowledge*, if he can.

If this is not shifting the burden of proof from the government to the defendant on the question of knowledge, it is difficult to perceive how such a thing could have been done.

Assuming that no proof was offered by defendant of his want of knowledge, can it be denied that under this instruction the jury might have convicted him upon the *admitted facts* of certification and want of funds, and upon the *presumption of knowledge* based on defendant's *duty*? This is a fair test of the question whether there was a shifting of the burden of proof by the instruction.

After this instruction is given, the Court adds, in the same paragraph:

“And, in general, if the defendant *acted in good faith* in making these certifications, believing that the state of the account of Dobbins & Dazey *justified it*, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by *bad faith*, would not *render him guilty*.”

And it has been contended by the government that this general statement cured the error, if there was any, in the preceding

lines as to the effect of defendant's duty; and the Court of Appeals seems to assent to that view, although it places its approval of the instruction, apparently, upon the idea that "defendant's legal duty, as an officer of the bank, to be informed, *was, prima facie*, evidence of his performance of that duty," citing 115 U. S., 339, 347, and 142 U. S., 71, both civil cases; and cites *Agnew vs. United States*, 165 U. S., 36, 49, as approving an instruction that "an inference or presumption of an unlawful intent throws the burden of proof on defendant."

The Court of Appeals seems to have fallen into the same error as the Circuit Judge in the application to the case of the rules and principles of civil responsibility instead of those applicable to crimes. This is evident from its treatment of this question and its citation of civil cases for the proposition that there is a *prima facie* presumption of the performance of *legal duty*—a proposition we have never questioned. It does not seem to have occurred to the Court that it was as much the legal duty of defendant *not to certify a check when funds were wanting* as it was *to know the funds were on hand* when he did certify; and the novel process of *presuming* the performance of one duty in order to convict a man of crime in the violation of another does not seem to have attracted its notice. This interesting question will have further attention later on in this argument.

As to the case of *Agnew vs. United States*, it does not sustain the conclusion of the learned Court of Appeals, for the reasons stated in the brief accompanying the petition to rehear.

Vide passim Rec., p. 127.

The contention of the government, above stated, is open to several answers. In the first place, the whole paragraph of the charge cannot be reasonably interpreted otherwise than according to the rule of construction which requires general statements to give way to special, definite, and particular ones which are in con-

flict. Reverse the order of these general and special statements, and the point we make will be clear. The charge would then stand substantially thus:

“Gentlemen of the jury: *In general*, if the defendant acted in good faith, believing the state of the account justified his certifications, he is not guilty of the offense charged; mere negligence or carelessness would not render him guilty.

“But, gentlemen, the bank was not liable upon these checks until the defendant made it so by certifying them. It was his duty before doing that to inform himself of the state of the account, if he did not already know it. From the existence of such duty you may infer that he did know it—it creates a presumption that he knew it, but this presumption is not an absolute one, and he may show, if he can, that he did not, in fact, acquire information of the truth.”

And when subsequently in the course of the charge, immediately upon construing the by-laws requiring of the president the honest and faithful discharge of his duties, the Court again told the jury, without one word of limitation or qualification, that “the honest and faithful discharge of his duties *required him to be informed of the condition of the account*,” it seems to us the jury could not have understood the *general* statement as modifying or taking away from their consideration the particular instruction as to his duty and its effect, made previously, and afterwards repeated with such emphasis, and without qualification, in immediate connection with the by-laws.

In the second place, the reference in the general statement to the defendant’s acting *in good faith* must be taken in connection with the Court’s definition of what he meant by acting in good faith; or, rather, acting *honestly and faithfully*, which is the

same thing. The Court told the jury, as has been seen, that "the faithful and honest discharge of his duties *required* him [the defendant] to be informed of the condition of the account."

And, again, when considering the expression, "believing that the state of the account . . . justified it," it must be taken in connection with what the Court elsewhere said of the belief which would justify the defendant in making the certifications. This will appear when we come to consider the 7th, 8th, and 9th assignments of error. What the Court required there was that defendant, in order to be justified in making the certifications, must have believed not only that the amount deposited was sufficient to cover the amount certified, but also *the overdraft then existing*, although the jury should find that he *had no knowledge of the overdraft*, and was not *chargeable with knowledge* by reason of shutting his eyes, etc.

And, lastly, on this point, the concluding lines, "Mere negligence or carelessness, unaccompanied by bad faith, would not *render him guilty*," do not help the criticised instruction, for the twofold reason that *bad faith*, as the Court defined it, substantially, was exhibited in certifying a check when there was a want of funds, although the defendant was ignorant of that fact, and because there was no such issue in the case. The defendant was not indicted for "mere negligence or carelessness," nor was any theory promulgated by the government to the effect that mere negligence or carelessness *would render him guilty*. On the contrary, the effort of the government was to show that, instead of being negligent or careless, the defendant knew the state of the account—that he was frequently among the books, which were subject to his inspection—that he frequently made inquiry of the clerks concerning accounts upon them—that everybody in the bank, from the cashier down, was familiar with the account, and in many other ways and by means of various circumstances and collateral matters the government sought to show that the de-

fendant was not negligent or careless, but actually *knew the state of the account*; while, on the other hand, the defendant sought to show that he did not know it, and it was urged in his behalf that want of knowledge, although such want of knowledge arose from carelessness, negligence, or overconfidence, *would excuse him*. The issue was, not whether mere negligence or carelessness *would render the defendant guilty*, but whether good faith and ignorance of the state of the account on the books, although such ignorance should be attributed to negligence or carelessness or overconfidence, constituted a good defense and *would excuse him*.

Now the Court told the jury simply that mere negligence or carelessness would not *render the defendant guilty*. It was not contended by the government that it would. The statement in this form met and was applicable to no issue in the case. The Court did not tell the jury that if defendant was merely negligent or careless without bad faith, that fact would rebut the presumption of knowledge arising from the duty to know. On the contrary, they were told that he might rebut this presumption by showing, if he could, "that he did not, *in fact*, acquire information of the truth"—leaving the impression not only that *that* was the only method open to him of rebutting that presumption, but also, we submit, implying that he must, nevertheless, make inquiry as to the state of the account, and if the information thus acquired was false, then he would be excused.

Now recurring to the main instruction under consideration, as to the presumption of knowledge from duty, it is to be observed, first, that even the presumption that public officers have done their duty does not supply proof of independent and substantive facts.

United States vs. Ross, 92 U. S., 281.

We have granted that it was the defendant's duty, growing out of his relationship to the bank as president, to inform himself

whether sufficient funds were in the bank before certifying the checks, and that this duty and relation were proper matters for consideration by the jury, in connection with all the other proof and circumstances bearing on the question of his actual knowledge at the time of certification.

But how can this duty supply proof of his knowledge of the state of the account? That knowledge is a *substantive fact*, alleged in the indictment, and necessary to be proven by the prosecution as one of the essential requisites of the crime.

Take a common-sense view of the matter for a moment. There is no *statute* that requires of an officer of a bank that before certifying a check he shall inform himself of the condition of the account of the drawer; but that duty does arise, manifestly, out of his office and relation to the bank. No statute, however, expressly so declares, or imposes upon him any penalty for the violation of such duty; and the case of *Potter vs. United States* clearly intimates that he may violate that duty with impunity, provided he acts without any purpose to do wrong. If he is ignorant of the want of funds, or acts without any purpose to do wrong, he is guiltless of crime, although he makes no effort to discharge this duty and inform himself of the state of the account.

On the other hand, the statute expressly imposes upon him the duty *not to wilfully certify a check* when there are not sufficient funds in the bank to meet it, and visits upon him heavy penalties of fine and imprisonment for its violation.

Now here are two duties, one arising from the relation of the officer to the bank, and, we will assume, also from the by-laws of the bank, with no penalties attached, and which may be violated with impunity so long as the officer acts honestly; the other expressly imposed by a statute of the United States, with heavy penalties attached. Assume, then, the undisputed facts of this case: An officer is found to have certified a check for a party

who had at the time no money to his credit, and there is no proof as to whether he knew of the want of funds or not. The charge is for *wilfully* violating the prohibition of the statute against certifying checks without funds. What *presumption* arises, either of law or fact? What *inference* may a jury lawfully draw under such circumstances? Is it to be *inferred* or *presumed* that the defendant performed his duty under the by-laws of the bank in order to predicate the conclusion that he *violated his duty under a statute of the United States and committed an infamous crime*, subjecting him to fine and imprisonment?

Such seems to be the logic of the instruction of the Circuit Judge and of the Court of Appeals in this case. That it is fallacious cannot but be obvious. It cannot be law that defendant is to be *presumed* to have observed the one duty in order to make him answerable criminally *for a violation of the other*.

It is a rule of law, and of common sense as well, that opposing presumptions, like opposing estoppels, neutralize and nullify each other and leave the matter at large (*Ricard vs. Williams*, 7 Wheat, 59); and "*omnia presumuntur rite acta*" is one of the maxims of the civil law, which obtains also in the common law; and one of the rules stated by Mr. Lawson and supported by many authorities is that "a person who is shown to have done any act is *presumed to have done it innocently and honestly*, and not *fraudulently, illegally, or wickedly*." (Lawson on Pres. Ev., p. 93.) Of course no one will question the presumption that a person charged with crime is innocent until his guilt is *proven beyond a reasonable doubt*, and that even *prima facie* proof of guilt does not remove such presumption.

Now, in view of the manifold beneficent presumptions indulged by the law, favorable to regularity, to honesty, to innocence, and in view of the provisions of the statute under which the defendant is indicted, the only presumption that can legiti-

mately be indulged in this case, from defendant's relation to the bank and his certification of these checks, is that the act was done *honestly* and *innocently*, in ignorance of the fact a knowledge of which would make his act not only *unlawful*, but *criminal*. This, we respectfully submit, is the proper and correct view of the doctrine of presumption in this case.

The real and only question to be determined by the jury, according to the view of the learned Trial Judge, was the *knowledge* of the defendant of the state of the Dobbins & Dazey account at the time of the certifications. We insisted that his unlawful or bad *intent* was also an essential element of the offense, implied by the use of the word "wilfully" in the statute; but the Court ignored that, as we have attempted to show, refusing in many ways both in the instructions given and denied, and in rulings on evidence, to recognize the pertinency of the question of intent.

So that, under the charge, the only *disputed* question necessary to be established to warrant conviction was the defendant's *knowledge* of the state of the account. The Court, as has been seen, after telling the jury that in order to warrant conviction three things must appear, namely, (1) certification by the defendant, (2) want of funds at the time, and (3) defendant's knowledge of such want of funds, proceeded to say (p. 34):

"Taking this evidence up in detail, *it is not denied* that the defendant certified these checks; and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks. *The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.*"

The whole case is here sharply stated in a nutshell by the Court as it was put by the Court to the jury. If the jury could reach the conclusion of defendant's *knowledge*, that was all that was necessary—all other essential facts being admitted.

The indictments alleged, as a fact, that defendant *knew* that Dobbins & Dazey did not have the funds in bank to meet the checks certified, and that, *with such knowledge*, he *wilfully* certified the checks.

These were manifestly material allegations—allegations essential to the validity of the indictments. That of knowledge the Court distinctly recognized as essential. It was, therefore, incumbent on the government to prove it as a fact *beyond a reasonable doubt*—not merely *prima facie*. In truth, the burden rested upon the government, in the first instance, to establish the whole case as charged—all the material facts—beyond a reasonable doubt, before the jury would be warranted in convicting.

Said Chief Justice Fuller, in *Agnew vs. United States*, 165 U. S., 49:

“Undoubtedly, in criminal cases the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial.”

And in *Lilienthal's Tobacco vs. United States*, 97 U. S., 266, the Court said:

“In criminal cases the true rule is that the burden of proof *never shifts*; that in all cases, before a conviction can be had, the jury must be satisfied, from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment.”

A headnote of *Stokes vs. The People*, 53 N. Y., 164, well supported by the opinion, is as follows:

“The Judge at the trial instructed the jury, in effect, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter, or excusable homicide.

“Held, error; nor was the error cured by a subsequent charge that if the evidence was doubtful, or if the jury entertain reasonable doubts, so that they do not know where the truth lies, the prisoner is entitled to the benefit of that doubt.”

In *State vs. Conway*, 55 Kan., 323, it was held that “an instruction which inferentially places the burden of proof upon the accused” is erroneous.

In *People vs. Millard*, 53 Mich., 70, the Court said:

“In every criminal case the burden of proof is throughout upon the prosecution. Whatever course the defendant deems it prudent to take in order to explain suspicious facts or remove doubts, yet it is incumbent on the prosecution to show, under all circumstances, as a part of their own case, unless admitted or shown by the defense, that there is no innocent theory possible which will, without violation of reason, accord with the facts.”

In *People vs. Fairchild*, 48 Mich., 32, 37, the Court said:

“The nature of the defense could not relieve the prosecution from the duty of proving the whole charge beyond a reasonable doubt; and it could make no difference

whether the doubt, in case of there being one, should arise from a defect of evidence on the part of the prosecution or from an impression made by evidence for the defendant."

In Wharton vs. State, 73 Ala., 368:

"In every criminal case there can be no doubt of the proposition that it is the duty of the State, in the first instance, to show beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis, every fact or circumstance which is necessary in order to establish the guilt of the defendant."

In the Trial of the Directors of the City of Glasgow Bank, already cited, it seems a similar effort was made to charge the defendants with some sort of *constructive* or *imputed* knowledge, arising from their duties as directors. The Court, in the charge, at page 435 of the report of the trial, delivered itself as follows:

"Secondly, as to the knowledge of the directors—as to their knowledge that these balance-sheets were fabricated. Now what the prosecutor has undertaken to prove, and says that he has proved, is not that these directors *were bound to know* the falsity of the statements in the balance-sheets—not that they *lay under obligations to know it*—not that they had the means of knowledge, but that, *in point of fact, they did know it; and that is what you must find* before you can convict the prisoners of any part of the offenses attributed to them. You must be able to affirm, *in point of fact*, not that they had a duty and neglected it—not that they had the means of information within their power and failed to use them—but that, *as a matter of fact*, when the balance-sheet was issued, *they knew that the statements contained in it were false*. I say that, because there has been some phraseology used

in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation; for what a man is bound to know he shall be held to have known. But *that has no place at all when a man is charged with crime*. His crime is his *guilty knowledge*, and nothing else. He is charged with *personal dishonesty*, and you must be able to affirm *that* on the evidence before you can convict him. But while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which *show and carry to your mind the conviction that the man* when he circulated, or when he made that balance-sheet, *knew that it was false*. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, *in point of fact, know the falsehood of which he is accused*."

Indeed, the principle announced by the instruction in this case goes further than is ordinarily permissible in a civil case.

In *Briggs vs. Spaulding*, 141 U. S., 132, Chief Justice Fuller, speaking for the Court, among other things, said, in reference to the conduct of the president and directors, sought to be charged in a civil suit with losses sustained by a national bank through the peculations and frauds of the cashier and employes having charge of its books and details:

"Their conduct is to be judged not by the event, but by the circumstances under which they acted (p. 155).

. . . Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption.

“ Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman vs. Dalley*, 51 N. Y., 27, 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: ‘ He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations,

and I know of no principle of law or rule of public policy which requires that it should.'

"And so Sir George Jessel, in *Hallmark's case*, 9 Ch. D., 329, 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and to have known that his name was on the register of shares as the owner of fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered on the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex Parte Brown*, 19 Beav., 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that of any other case to impute to this director the knowledge which it is sought to impute to him in this case' " (162-3).

In *Verona Cheese Factory vs. Murtaugh*, 4 Lans. (N. Y.), 17-22, which was an action to recover penalties imposed by statute upon "whoever shall knowingly" do certain acts, it was held that knowledge could not be imputed to the defendant from the acts of others and their agency for, or relation to, him. The Court said:

"The term 'knowingly' in an action like this must undoubtedly be held to mean *actual personal knowledge*. . . . The term 'knowingly' was used to designate the person upon whom the penalty was imposed; and it is not to be enlarged or extended so as to reach any supposed

mischief which the statute was intended to guard against and prevent.”

In *Murray vs. The Nelson Lumber Company*, Supreme Court of Massachusetts, 9 N. E. Rep., 634, where it became necessary to prove that the directors of a corporation had knowledge of a certain fact, the Judge who tried the case ruled that, in the absence of direct and positive evidence of the knowledge of the directors, jurors had the right to assume that they were doing what they were appointed to do, and that they know what they are appointed to know. But the Supreme Court held that this ruling was erroneous. In other words, that it must be proved as a fact that the defendant had knowledge, he cannot be charged with imputed knowledge, and he cannot be held guilty simply because the jury find that he had the opportunity to know.

We add, in conclusion of this division of the argument, as we wish the Court to clearly understand our position, that we concede that defendant's duty was a circumstance proper for the jury, *along with all the other facts and circumstances of the case* on the question of his knowledge. We also concede that the fact of knowledge, as well as of intent, may be proven by circumstances, like any other fact. But we contend that the burden rests on the government *to establish by proof*, beyond a reasonable doubt, the fact of guilty knowledge, just as any other essential and disputed fact of the case; and that the question is, whether *upon all the proof in the case on both sides, and as a whole*—including the fact or proof of defendant's duty—that knowledge is so established. And we insist it was error for the Court to single out a fact or circumstance, as the *duty* of defendant, segregate it from the other facts and circumstances, and tell the jury that they might *infer* or *presume* from that the fact of knowledge, and thereby *shift the burden of proof*, which rests upon the government, to the shoulders of the defendant.

VIII.

MODIFICATION OF SPECIAL INSTRUCTIONS SO AS
TO MAKE DEFENDANT RESPONSIBLE FOR
OVERDRAFT, WHETHER HE KNEW
OF IT OR NOT.

This is the 7th subject stated generally at the beginning of this argument, and is briefly referred to at pp. 7-10 of the petition for certiorari, which see for the full 5th and 7th special instructions as they were asked, for the 5th instruction as modified and given, and for the instruction given as a part of the 7th. The same matter appears at pp. 50-52 of the record. See also brief with petition to rehear.

Rec., pp. 138-140.

This action of the Court is the basis of the 7th, 8th, and 9th assignments of error.

Rec., pp. 16-17.

The error here manifested is that of which we have already so much complained, in its most intensified form, namely, the error of attempting to reach a conviction by *inferring*, or *presuming*, or *imputing* to the defendant a knowledge of the state of the Dobbins & Dazey account which neither the *facts* directly proven nor the *circumstances of the case* fixed upon him—an error which is fundamental and pervades the case in its every part; but it is more than this—the action of the Court upon these instructions was *contradictory* and *inconsistent with itself*, and *confusing to the last degree*; and, moreover, if followed by the jury, excluded all possibility of acquittal.

It is to be observed, in the first place, with reference to both

these requested instructions, that there was evidence before the jury tending to establish *every fact* hypothetically put by them—evidence from which, as the bill of exceptions states, *every one of such facts might have been found by the jury*. We make the statement with emphasis that there is not a single fact asked to be put hypothetically to the jury in either of these instructions as originally offered, which the jury might not have *found to be true* from evidence before them—evidence which the bill of exceptions shows came as well from the *plaintiff's* as from the defendant's witnesses, and which would have *warranted* such findings.

Now if these were really the circumstances and this the situation as defendant understood them, it is most obvious that when a check of Dobbins & Dazey was presented to him for certification, in the absence of the cashier, the *most natural* source of inquiry open to him would be, not the individual bookkeepers, for their books would not likely show the deposits of that day, but the exchange clerk who kept an account of the New York drafts as they came in; and if, *having no knowledge of an overdraft*, he received information of deposits on that day sufficient to cover the check, it would be entirely reasonable for him to certify it. The exchange clerk proved that such inquiries were made of him by the defendant; and, moreover, it was shown that on each day of the certifications, with one exception, when Porterfield was in and told defendant the account was all right, *deposits were in fact made more than sufficient to cover the checks certified*.

In view of this aspect of the case, which was indeed the most vital of all aspects of the case to the defendant, and in order that the jury might pass upon it fairly, defendant asked the Court by these requests to instruct them, in substance, that if they found from the proof that, notwithstanding the account was overdrawn on the books, defendant *did not know it*, and believed in good faith when he certified the checks that the exchange deposited

by Dobbins & Dazey on the days of the certifications was sufficient to cover the amount of the check certified, he was not guilty.

Is it possible defendant was not entitled to this instruction, especially with the addition of the qualification, not excepted to, "unless such ignorance of the overdraft was *wilful* as elsewhere explained in the Court's instructions"? If the facts hypothetically assumed were true, was he not innocent of a *wilful* false certification, as that offense is defined by the authorities we have quoted? Where was the *criminal knowledge*, the *bad intent*, the *purposed* and *conscious violation of law*?

But what did the Court do?

It said, in effect, that although defendant *had no knowledge of the overdraft* at the time he certified the checks, yet he must have believed, in order to be innocent, that the exchange deposited was sufficient to cover, not only the checks certified, *but also the overdraft then existing*. In other words, he must have believed the deposits sufficient to cover not only the checks he certified, but also *another indebtedness of which he had no knowledge*. This is the necessary meaning of the instruction as modified by the Court, if it can have any meaning at all. It is even worse than if it said, in so many words, defendant *was bound to know of the overdraft*, and was guilty *whether he knew of it or not*, for then it would at least have had the merit of consistency with itself.

It would have been fairer to defendant to have refused the instruction entirely than to have modified it and *reversed* its meaning in this way. A shield of defense in its original form, it was converted by the Court into a sword of inevitable destruction, for it suspended the hope of acquittal upon a most obvious impossibility.

This same error is repeated again in the clause of the charge above quoted, taken in part from the final clause of the defendant's 7th special instruction.

The Court wrote upon the margin of the original 7th special instruction that the latter part of it was correct and would be given. But alas, when it came out, how metamorphosed it was, how different, how *opposite* from what was in the mind of defendant's counsel! Let us place side by side, for comparison, the latter part of the 7th special instruction as it was asked, and the instruction which was given:

ASKED.

"And that, having no knowledge of the overdraft of Dobbins & Dazey's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

GIVEN.

"If you find that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, *in addition to the existing overdraft*, he would not be guilty under the indictment, and you should acquit him."

Now note the omission of the antecedent qualifying terms of the instruction asked, and the addition of the same fatal words which were inserted in the 5th special instruction—"in addition

to the existing overdraft"—and are we not forcibly reminded of the words of the Saviour when he said:

"Or what man is there among you, whom if his son ask bread will he give him a stone? Or if he ask a fish, will he give him a serpent?"

The whole of the 7th special instruction, we respectfully insist, should have been given without modification. The facts it puts were pertinent to the case and went to the very heart of it, in elucidating the defendant's situation and the *intent* with which he acted. They enabled the jury to judge the defendant, as Chief Justice Fuller so well said in the case of Briggs vs. Spaulding, "not by the event, but by the circumstances under which he acted." And when the Court carved out a part of it, emasculated that of its meaning by separating it from its context, and then added a clause which completely *reversed* its import and made of it an absolutely *fatal* instruction against the defendant—rendering his acquittal utterly impossible, for there was no pretense that he believed the deposits sufficient to "cover the check certified, *in addition to the existing overdraft,*" and indeed this was not possible if he did not know of the overdraft—the error in refusing the instruction was doubly intensified.

It was urged by the learned counsel for the government in opposition to our motion for new trial, doubtless with effect upon the Court—and it may be so contended here—that the 5th instruction was not good because *the law applied the deposits first to the overdrafts*, as the Court had instructed the jury in the charge. (Rec., p. 149.) The language of the brief was (pp. 8-9):

"The instruction, as originally presented, was well calculated to mislead the jury into supposing that if 'the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified, was sufficient to cover

the amount of said checks, then the defendant was not guilty,' etc.; whereas, the exchange deposited by Dobbins & Dazey, *as a matter of law, had to be appropriated to the absorption of the overdraft which appeared on the account at the commencement of business.*"

If anything were wanting to show the utter perversion of the humane doctrines of the criminal law in the minds of this prosecution, it is to be found in the sentence just quoted.

In heaven's name, what has the *legal appropriation of the deposits to the overdraft* to do with the question of defendant's guilt *if he was ignorant of the overdraft, and his ignorance was honest and not wilful?*

Now here is a man who, according to this instruction, *as given*, has *no knowledge of any overdraft*, either *actual or constructive*, who *honestly* certifies a check that is fully covered by a deposit which, as he is informed, is made on the same day, and which is *in fact* made—and yet it is gravely argued that he is to be held guilty of the infamous crime of *wilfully* certifying *that check, knowing there were no funds to meet it*, because forsooth *the law* immediately applied the deposit to the *absorption of an overdraft of which he had no knowledge*.

Such a proposition is worthy only of the heartless inhumanity of the Draconians, whose laws are said to have been *written in blood*.

Another argument which was made by counsel for the government in support of the Court's action in thus modifying the 5th instruction, on the motion for new trial—and which may be repeated here—deserves notice.

We refer to the analysis which they attempted of this 5th instruction, on page 9 of their printed brief.

“ Let us take the first clause of the instruction,” said counsel,
“ which was as follows:

“ ‘ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, . . . then he is not guilty, and you should acquit him.’

“ Such an instruction,” said they, “ would have been correct.”

“ Now let us take the second clause of the instruction,” said they, “ which was as follows:

“ ‘ If the defendant certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey, on the days upon which said checks were certified, was sufficient to cover *the amount of said checks*, then he is not guilty, and you should acquit him.’

“ Such an instruction,” it was gravely suggested, “ would have been manifestly improper, *because, as a matter of law*, the exchange deposited *would have to go in absorption of the overdraft* existing at the commencement of business.”

Now it may be that the latter clause, *standing alone*, would have been improper; for it is to be observed that counsel have cut it off both from the antecedent clause *negating knowledge of the overdraft*, and from the succeeding clause, “ unless such ignorance [of the overdraft] was wilful as elsewhere explained in the Court’s instructions ”—which latter clause was added by the Court, but without exception by defendant. So that the second clause in counsel’s analysis stands *without any negation of knowledge of the overdraft*; and if we assume such knowledge,

then said clause, standing alone, would manifestly have been improper.

But is this a proper or a lawyer-like or judge-like way to treat the instruction requested by defendant? Is this a proper way to test its meaning? In the same way we may prove by the language of the Bible that there is no God. The very words are there: "There is no God." But the meaning is quite different when we read the whole sentence: "The fool hath said in his heart, There is no God."

Now this remarkable analysis and the even more remarkable deduction from it, amount simply to this: The first clause which, standing alone, would have been proper, is rendered noxious by the further fact, stated in the second clause, that *deposits were made, or believed by the defendant to have been made, sufficient to cover the checks certified*. And this *because the law seized those deposits and applied them elsewhere, though without the defendant's knowledge*.

To state it a little differently: If the defendant, being ignorant of the overdraft, had certified the checks *without any semblance of a basis for his act*, he would have been innocent; but if he had information of deposits sufficient to cover them, and therefore *a reasonable basis for his act*, he is guilty!

Such is the logic which opposes us on this question.

We specially refer to the brief on petition to rehear and authorities therein cited, on these assignments.

Rec., pp. 138-141.

If the 5th instruction means anything, it means that the Circuit Judge himself thereby *made* the inference of defendant's knowledge of the state of the account which he had previously told the jury they *might* make, for in it he holds the defendant to the necessity of seeing that the deposit of which he had information

and on which he relied was sufficient to cover the overdraft then existing, although the jury should believe he did not know of such overdraft and could not be charged with knowledge by shutting his eyes, etc.

IX.

ACTION OF COURT ON REQUEST OF JURY FOR “THE LAW AS TO THE CERTIFICATION OF CHECKS WHERE NO MONEY APPEARED TO THE CREDIT OF THE DRAWER.”

This is the 8th and last question stated generally at the beginning of this argument. It is briefly adverted to in the petition for certiorari (pp. 5-7).

The learned counsel for the government, in his opening statement to the jury, had conceded that the word “wilfully” imported a “bad intent, to injure the bank,” and offered evidence of sundry collateral facts as proof of such intent. The record shows that as many as three times, in his opening statement to the jury, counsel for the government used this expression: “As further evidence that Spurr certified the checks of Dobbins & Dazey *wilfully, or with bad intent, to injure said bank*, the government expects to prove,” etc. (see Rec., pp. 54, 65, 66, and 67, paragraphs 13, 14, and 15, of opening statement); and by far the larger part of the time and labor of the trial, as is apparent from the record, was consumed in efforts of the government to show, by collateral matters not connected in any way with Dobbins & Dazey or the offenses charged, that defendant acted “*wilfully, or with bad intent, to injure the bank.*”

This intent of the defendant was naturally the subject of discussion by counsel before the jury. It was expected, of course,

that the Court in the general charge would refer to the statute creating the offense and explain and define its terms, and especially the term "wilfully;" and hence the requests by defendant for special instructions, which were formulated and handed to the Court at his suggestion before the delivery of the general charge, contained only one instruction embodying the word "wilfully" as applied to the act of certification, which, as has been seen, was refused.

Notwithstanding the statute made criminal only a *wilfully* false certification, the indictment charged a *wilfully* false certification, and counsel had read the statute and discussed before the jury a *wilfully* false certification, yet the Court had gone through his entire instructions to the jury and committed the case to them *without even so much as referring to the statute creating the offense*, or to the argument on the subject, and without defining to the jury what a *wilfully* false certification was, or even *using the word "wilfully"* as applied to the act of certification anywhere in his charge.

It was no matter of surprise, therefore, that the jury, under these circumstances, should soon find themselves at sea on the very threshold of the case—that they should wish to be informed of the offense they were trying defendant for. It is fairly inferable that, after reading over the charge for themselves, they were puzzled at finding nothing in it about the word "*wilfully*," and the "bad intent to injure the bank," of which so much had been said and to establish which so much evidence had been offered on the trial; and hence, after deliberating some hours, they return and hand to the Court a paper reading: "We want *the law as to the certification of checks where no money appeared to the credit of the drawer.*"

If confirmatory proof were needed of the justice of our criticisms of the several previous actions of the Court in this argu-

ment, it is to be found in the reply of the Court to this most natural, reasonable, and pertinent request of the jury.

The following is the Court's answer and action thereon, as quoted from the record (pp. 53-4):

" 'The jury state that they want the law as to the certification of a check where there is no money to the credit of the drawer.

" 'I cannot better answer this question which the jury has put to the Court than by reading the section of the Revised Statutes which relates to that subject [reads from Sec. 5208, R. S.]: "It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check."

" 'Does this answer your question?'

" Foreman of the jury: 'Yes, sir.'

" The Court: 'I read it again, so that you may all understand it.' (The Court read again that part of Sec. 5208, R. S., quoted above, and added):

" 'Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the Court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit or line of credit.

" 'I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the

bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. *That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*

“ ‘ You understand what I have said now is to be taken in connection with what I have before instructed you.’ ”

“As the jury were retiring, counsel for defendant said to the Court that he thought what the jury wanted was the Act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the Court had read to them, and that the Court ought to read and explain that Act to the jury. The Court asked if counsel referred to the Act prescribing the penalty for false certification, and, on being answered in the affirmative, stated that *the jury had nothing to do with that.*

“ To this action of the Court in reading twice Sec. 5208 of the Revised Statutes and in failing to read and explain the Act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time, beginning with the words ‘ the \$30,000 ’ and ending with the words ‘ to meet it,’ the defendant then and there excepted.”

And this action is the basis of the 11th assignment of error.

Rec., p. 18.

Now there cannot be a doubt, we respectfully submit, that what the jury wanted to know was the *law applicable to this case*

which they were trying—the law applicable to a *criminal* false certification. Most assuredly they could have had no use for any other. They were not concerned with what it was merely *unlawful* for national bank officers to do, but with what it was *criminal* for them to do. Besides, the Court had told them in the first part of the charge (Rec., p. 148): “It is upon the *false certification* of the four above-mentioned checks that the issues of this case are joined.”

What reply should the Court have given to this request of the jury, especially in view of the omissions in previous instructions which made necessary such request? Manifestly the Court should have read and expounded the law which created the offense—at least, what was necessary to constitute a *wilful violation* of Sec. 5208, Revised Statutes, inhibited by the Act of July 12, 1882, should have been stated and explained. Yet the Court, instead of doing this, reads to the jury as a full answer to their request—nay, more, as the *best* answer he can possibly give them—a statute which created no offense against the criminal law, a statute which simply declared what should be *unlawful* in respect to certifying checks, like the taking of excessive interest, or real estate security, or the loaning of more than one-tenth of the capital stock to one person, firm, or corporation, by a national bank, would be unlawful.

But this is not the worst, though bad enough. The Court does not stop with the simple reading of this civil statute as an answer to the jury's request, although assured by the foreman that their question has been answered (?). The Court proceeds to reiterate and emphasize what had been told the jury in the general charge: “That a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank,” that “it does not create any obligation until it is certified as good by an officer of the bank,” that that certification “makes the check good as to the holder of it, and the bank then becomes estopped, although

there was no warrant for the drawing of the check, as against the bona fide holder," that "the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good;" and then tells the jury that "*that is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*"

Can there remain a vestige of doubt that the jury understood this as *the law of the case they were trying*—a definition of such a *false certification* as the Court had told them the issues of the case were joined upon?

And yet no hint is here given them that to be criminal the act must be done *wilfully*. Nothing is here said of the *intent* of the defendant. His conscious *knowledge* of the circumstances of his act is not even referred to as an element of the offense. They are told, in substance, and almost in so many words, expressly, that *the certification of a check by an officer of a bank when there are no funds there to meet it, is the offense for which they are trying the defendant.*

It is, we submit, no sufficient answer to say that the Court, at the conclusion of this "definition" of the offense, told the jury that what he then said was to be taken in connection with what he had before instructed them. The Court had not previously, as has been seen, given any clear and explicit definition of the offense; and for this reason, manifestly, the jury asked for such definition. This was the place to give it. This was the Court's last utterance to the jury, and it is idle to say that this pointed, explicit, and vigorous answer of the Court to a request calling specifically for a definition of the offense, obviously intended by the Court to be full and complete, can be modified and cured by a general reference to previous instructions in themselves so uncertain as to leave the jury in doubt as to their meaning and induce them to call for further and more specific instructions.

The obvious effect of this instruction upon the jury was to make certain, in their minds, what was before uncertain and indeterminate by them from previous instructions, namely, that the *offense*, of which they were to determine the defendant's guilt or innocence, was "*the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*" This is the language of the Court in the very last sentence of the instruction.

Moreover, that it was the purpose of the Court to leave this with the jury as a complete definition of the offense, disentangled from any qualifying conditions implied by the word "wilfully," as employed in the Act of 1882 and in the indictment, is most manifest from the refusal of the Court to read and explain that Act to the jury, when requested to do so by defendant's counsel, and from his statement at the time that "*the jury had nothing to do with that Act.*"

Astonishing as it may appear, the contention of counsel for the government in support of this action of the Court has been that it was *satisfactory to the jury, because the foreman said so*; and more astonishing still is the fact that the learned Court of Appeals sustains counsel in that view. That learned Court, in its opinion on this point, says:

"The argument in support of this exception *assumes* that 'what the jury wanted to know was the law applicable to this case, . . . the law applicable to the criminal false certification;' and, therefore, the Court should have read Sec. 13 of the Act of July 12, 1882. . . . *The assumption is negatived by the answer of the jury.*"

Rec., p. 117.

That our contention is not an assumption, but is based upon fact, and the only reasonable conclusion arising from the circumstances, we submit, is indisputable. It is inconceivable why the

jury should have wanted any other law than that which was *applicable to this case*—to such a certification as they *were trying the defendant for*. They had no concern with, and could have had no use for, the law applicable to a mere *civil* responsibility. As has been seen, this has been the trouble throughout the case—it has been treated too much as if it depended on the section of the Revised Statutes read by the Court alone; the Act of 1882 has been well-nigh lost sight of, relegated to a position of “innocuous desuetude.”

As to the reply of the foreman of the jury that the reading of Sec. 5208 of the Revised Statutes answered their question *negating* our contention, that implies that *the jury*, having asked the Court for information *on a matter of law*, are to be the judges of the correctness of that information; and if *they are satisfied*, that ends all controversy. It ought to be sufficient to remind the Court that the jury were not the arbiters of the law, nor the censors of the Judge as to matters of law. They had asked him for instruction in a pure matter of law, about which it must be assumed they were ignorant, else they would not have asked the question nor needed to be instructed at all, and it was the duty of the Judge to instruct them correctly. Whether he *satisfied the jury* or not is wholly immaterial; the question is: Did his instruction *satisfy the law*?

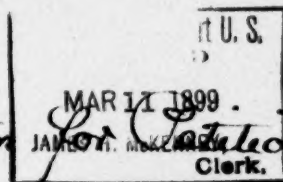
Respectfully submitted,

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N^o. 448.

Brief of Horton for Petitioner
Filed Mar. 11, 1899.



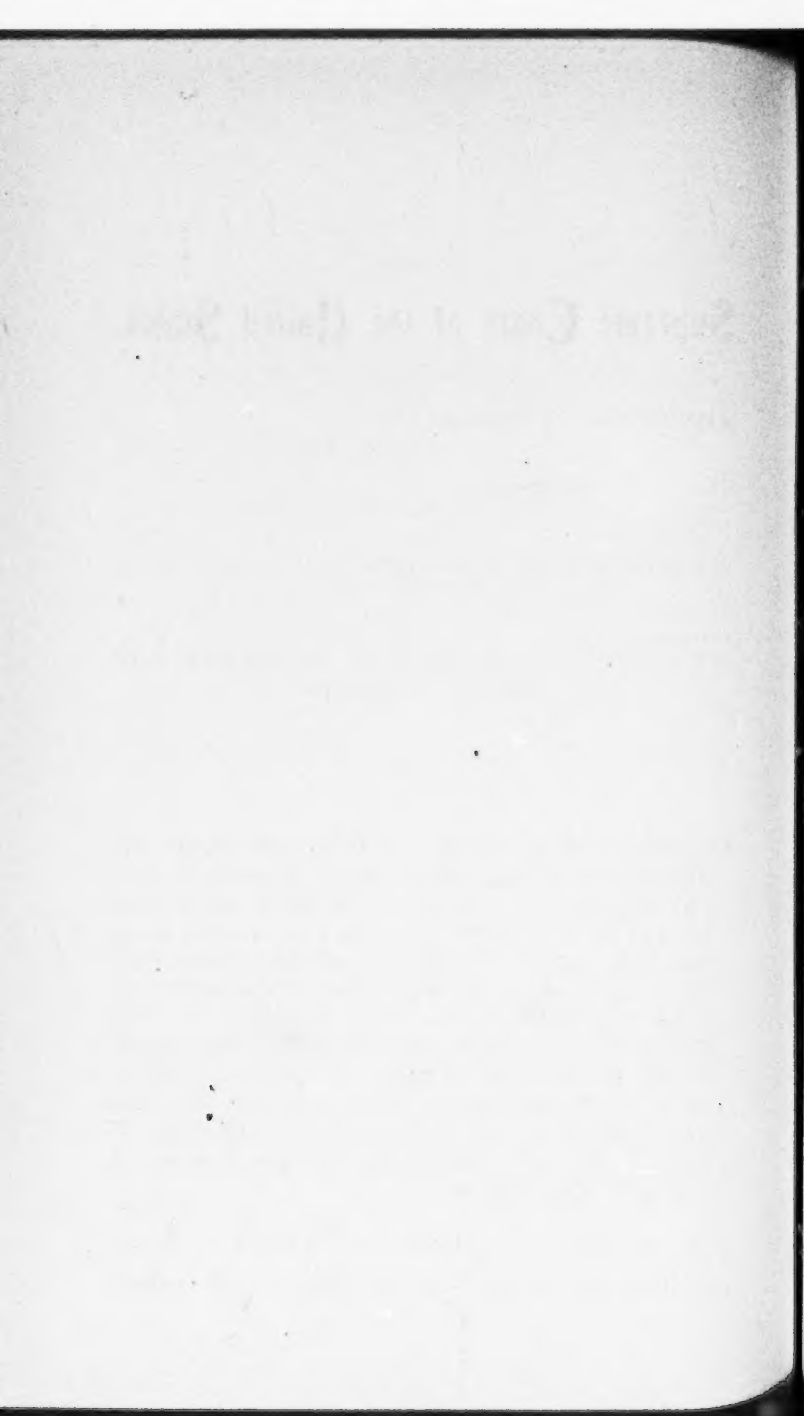
IN THE
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MARCUS A. SPURR, *Petitioner*,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT.

**SUPPLEMENTAL BRIEF AND ARGUMENT FOR
MARCUS A. SPURR.**

ALBERT H. HORTON,
One of the Counsel for Marcus A. Spurr.



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**SUPPLEMENTAL BRIEF AND ARGUMENT FOR
MARCUS A. SPURR.**

I.

TRANSACTIONS OF STOCKS IN 1886-7 REFERRED TO. ERRONEOUS INSTRUCTION THAT TECHNICAL VIOLATIONS OF THE BY-LAWS OF A BANK, OR OF THE STATUTES RELATING TO NATIONAL BANKS, BY A CASHIER, AFFECT THE RIGHT OF THE PRESIDENT OF SUCH BANK TO RELY ON THE STATEMENTS OF SUCH CASHIER. UNDER THE RULINGS OF THE TRIAL COURT, A PRESIDENT OF A NATIONAL BANK IS NOT PERMITTED TO RELY ON THE STATEMENTS OF A CASHIER ABOUT THE ACCOUNTS OF THE BANK, EVEN IF HE IS REPUTED TO BE AND BELIEVED BY THE PRESIDENT TO BE A MAN OF HONESTY AND TRUTH.

AS STATED in our former brief, Marcus A. Spurr was indicted for the false certification of certain

checks under § 13 of the act of Congress of July 12, 1882. This section reads :

“That any officer, clerk or agent of any national banking association who shall willfully violate the provisions of an act entitled ‘An Act in reference to certifying checks by national banks,’ approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.” (Act of July 12, 1882. Supplemental to the Revised Statutes of the United States, Volume 1, second edition, 1874-1891, page 357.)

See, also, § 5208, Revised Statutes of United States.

The case was first tried before Judge SAGE, and resulted in a mistrial. Then it was tried before Judge W. H. TAFT, and resulted in an acquittal for Mr. Spurr on all the counts based on the check of February 27, 1893, and a mistrial as to the other counts. It was again tried, before

Judge HENRY F. SEVERENS, and on Friday, April 17, 1896, the following verdict was returned :

"Came the United States Attorney, and came the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the court."
(R. 5.)

On December 12, 1896, the motions of Mr. Spurr for an arrest of judgment and for a new trial were overruled, and thereupon the following proceedings were had :

"The court, being cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3, 1893; and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date." (R. 7, 8.)

Subsequently an appeal was taken in the case to the United States Circuit Court of Appeals for

the Sixth Circuit, and an opinion was handed down by that court on June 1, 1898, affirming the judgment. (R. 105-123.) The case is now here on a writ of certiorari. In view of the brief and argument recently filed for the United States in this cause, we supplement our former brief with a short additional argument.

We discussed very fully in our principal brief the alleged error of the trial court in admitting upon the trial evidence of separate, independent, and dissimilar collateral matters of 1886-7, and the rulings of the court upon the effect thereof. (Brief, pp. 21-52.) After counsel for defendant below had objected to the evidence and the court had heard argument thereon, the trial judge said, *inter alia* :

"I greatly doubt whether it [such evidence] would be admissible on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield [cashier of the Commercial National Bank], or upon his assumed correctness of action and honesty of purpose. . . . I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact whether he did rely upon any assumed correctness or honesty of action."

At the time the court announced its rulings, the jury were present. (R. 55-56.)

Subsequently, upon cross-examination, the question of the scope and purpose of this evidence was further discussed in the presence of the jury, and the court said, *inter alia* :

“The view of the court as to the particular transactions or matters that have just been referred to is this: The question here involved cannot be affected by what was done by the bank with other customers. Those transactions must stand or fall upon their own merits, and this particular transaction cannot be affected by what the bank may have done with other parties.

“Mr. Pitts: I don't know as I made myself clear, if your Honor please, as to the purpose of the evidence. It was simply to show the character of the transactions, and that they were of the same character as those proven by the Government, and belong in the same category, so as to show it was in the ordinary course of business of the bank. That was all.

“The Court: If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done. I do not mean to characterize or express any opinion about any particular transaction, but it seems to me the whole inquiry in reference to this very question is upon a collateral substance; and to refer again to what I have already said, if those

transactions were of an illegal character, it would not help the present situation." (R. 60-61.)

We call attention specially to the language of the court, made in the presence of the jury, concerning stock purchases made in 1886-7: "If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done." (R. 60.) There was no proof of any loss by the bank on account of these transactions of 1886-7, nor of any dishonesty of Porterfield in respect to them, further than what might be implied from the fact that such transactions were not authorized by the national banking law. (R. 61.)

Referring to the stock purchases of 1886-7, the court in its general charge instructed the jury that—

"The using by its officers of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national

banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." (R. 63, 154, 155.)

The court also charged the jury that the defendant would be deprived of the right to rely upon the cashier, if it was shown beyond a reasonable doubt that Mr. Spurr knew that the cashier was acting "unlawfully in respect to its affairs." (R. 153.)

"Defendant requested the court to give the following special instruction, being the 13th of defendant's requests:

"13. Although a national bank has no authority by law to receive and execute orders from its

customers for the purchase and sale of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business, and that the Commercial National Bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge or reason to suspect the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own securities as other customers were required to do.

“Which instruction the court refused, and to which refusal the defendant then and there excepted.” (R. 63, 64.)

It is evident from the ruling of the trial court, that the court was in doubt for what purpose evidence of the stock transactions of 1886-7 was admissible.

Referring to the stock purchases, the court also, in its general charge to the jury, said :

“The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank’s property in them ; and proof of them has been admitted, *and is to be applied by the jury, solely upon the question of the knowledge and intent of the respondent when he made the false certification of the checks mentioned in the indictment.*” (R. 155.)

It appears from the record, that when the evidence of the stock purchases of 1886-7 was admitted, the court said :

“I greatly doubt whether it would be admissible [for the purpose of effecting the question of intent] on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of respondent’s right to rely on the representations made by Mr. Porterfield.” (R. 56.)

But when the court charged the jury, it held such evidence admissible, *not only as affecting the defendant’s right to rely on the representations made by the cashier, but also that such evidence “is to be applied solely upon the question of the knowledge and intent of the respondent, when he made the false certification of the checks mentioned in the indictment.”* Therefore, the court impressed the jury

that the transactions referred to in 1886-7, about stocks, *were important in determining the knowledge and the intent of the defendant in certifying the checks referred to in 1892-3.*

Defendant also requested the court to give the following special instruction, being the defendant's 10th request :

"10. If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth, the defendant would have the right to rely upon his statements in regard to that account." (R. 64, 153.)

The court struck out "truth," and substituted "right conduct as respects the affairs of the bank," and then gave the instruction modified. (R. 64.)

It therefore appears from the record that the evidence of the collateral transactions of 1886-7 was pressed before the jury by the language of the court in various forms as of supreme importance for their consideration. The jury must

have understood from the remarks of the court concerning this evidence and the instructions given thereon, taken in connection with the instruction which was prayed for, but refused, that if the cashier in the ordinary course of business of the bank committed technical violations of the national banking law, Mr. Spurr had no right, as president of the bank, to rely on the representations made by the cashier, or upon his assumed correctness of action or honesty of purpose. If the court had said in its remarks to the jury and in the instruction referred to that if the cashier had violated, in the alleged transactions of 1886-7, the national banking law with a bad purpose,—with an evil intent,—with a purpose to do wrong, a very different question would be presented. Upon the trial, defendant below testified that he “relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey,” (R. 64,) and that the cashier’s “reply always was that it was perfectly satisfactory and very profitable.” (R. 82.)

On account of the remarks of the trial court and the instructions given, and the refusal to give the one referred to, this evidence of the defend-

ant necessarily could have no weight with the jury. If the jury found that in carrying on the transactions of 1886-7, concerning which "there was no proof of any loss by the bank on account thereof," (R. 61,) the cashier, in following the ordinary course of business of the bank, acted unlawfully and in violation of its by-laws or of the statute, (regardless of whether such action was willful or not,) the jury were to understand that Mr. Spurr had no right to rely upon the statements of the cashier regarding the account of Dobbins & Dazey. This is emphasized by the action of the court in striking out from the tenth instruction prayed the word "truth," and inserting in place thereof, "right conduct as respects the affairs of the bank." (R. 64.) In view of the remarks of the trial court referred to, and the instructions to the jury contained in the general charge of the court and the modification of the tenth request prayed for, the jury were informed in substance that the defendant had no right to rely upon the statements and representations of the cashier of his bank on account of mere unlawful or technical violations of by-laws or the statutes; and yet the record shows that

there was no proof of any loss by the bank on account of the transactions of 1886-7, nor of any dishonesty of Porterfield at that time in respect to them, further than what might be implied from the fact that they were not authorized by the national banking act.

The court refused, as above stated, to instruct the jury that if the defendant in good faith believed the statements and representations of the cashier to be true, and "if the cashier was reputed to be and believed by the defendant to be a man of honesty and truth," he might rely upon such statements and representations in regard to the account of Dobbins & Dazey. (R. 64.)

The court continually suggested to the jury that if the cashier acted unlawfully in respect to the affairs of the bank, the defendant was not entitled to rely upon his statements. Under such an instruction, a cashier or other employe of the bank, who is charged with not having diligently performed the duties devolving upon him by the Banking Act, is not to be credited or believed by the president or other superior officer of the bank. This is not the law.

Briggs v. Spaulding, 141 U. S. 132-155.

Counsel for the Government concede, on page 102 of their brief, that "dealing in stocks" is not expressly prohibited by the statute to national banks. A prohibition, however, is inferred or implied, on account of the failure to grant the power.

First Nat. Bank v. Nat. Exchange Bank,
92 U. S. 128.

By the remarks of the court and its action commented upon, in our view, the rights of defendant below were not only greatly prejudiced, but flagrantly violated. After such remarks and such instructions, there was no opportunity for counsel for defendant below to convince the jury by argument that in certifying the checks described in the indictments, Mr. Spurr had information from the cashier, upon which he relied in good faith, that a sufficient amount had been deposited and was in the bank to cover the checks certified, unless the jury first found that the collateral transactions of 1886-7 never occurred.

The following instruction of the court was of little purpose or benefit to the defendant below, if the statements of the cashier could not be relied upon, if it appeared to the jury from the

transactions of 1886-7 such cashier had violated the by-laws of the bank or the statutes :

“If you find ‘that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank to cover the check certified,’ I add : in addition to the existing overdraft—‘he would not be guilty under the indictment, and you should acquit him.’” (R. 152.)

The court assumed that if in the transactions of 1886-7 the cashier acted in violation of the by-laws of the bank or the statutes, Mr. Spurr had no right to rely upon the statements of the cashier, and therefore, having no right to rely upon the statements of the cashier, the jury must of necessity have disregarded all of the evidence offered by defendant below that in certifying the checks he relied upon the representations of the cashier in good faith. The court in substance said to the jury that there could be no reliance by defendant below upon the cashier in good faith on account of the alleged transactions of 1886-7, which were proved by the Government over the objections of the defendant below.

II.

THE WORD "WILLFUL," AS USED IN SECTION 13 OF THE ACT OF CONGRESS OF JULY 12TH, 1882, ERRONEOUSLY OMITTED FROM THE DESCRIPTION OF THE OFFENSE IN THE CHARGE OF THE TRIAL COURT.

In our former brief we contended that the trial judge, in defining the offense charged against the defendant, omitted to properly instruct the jury concerning the word "willfully," as used in § 13 of the act of July 12, 1882. The learned counsel representing the Government in their brief insist that the court "instructed the jury that the certification of the checks must have been done willfully, designedly, and in bad faith." In our view, this assertion is not supported by the record. *The word "willfully" was not used by the trial judge concerning any affirmative act of the defendant in the certification of the checks.* "Willfully" was used by the court in its charge, but only in emphasizing negative conduct of the defendant, not affirmative action on his part. The court, in its instructions to the jury, said :

"If the proof fails to satisfy to your mind clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that

Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) *shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.*" (R. 153.)

The court also said in its charge to the jury :

"If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, *unless ignorance of the overdrafts was willful, as elsewhere explained in the court's instructions.*" (R. 152.)

The court used the word "willful" twice in the parts of the charge quoted, *but it did not instruct the jury that the Government was bound, in order to maintain the indictments, to prove that the defendant*

willfully, designedly, and in bad faith certified the checks described in the indictments; therefore, the word "willful" was, as we contend, erroneously omitted from the description of the offense in the charge to the jury.

"Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact, or without any purpose to evade or disobey the mandates of the law."

Potter v. United States, 155 U. S. 155.

The significance of the word "willful" in the criminal statutes has been considered by this court. In *Felton v. The United States*, 96 U. S. 699-702, it was said :

"Doing or omitting to do a thing 'knowingly and willfully' implies not only a knowledge of the thing, but a determination with an evil intent to do or to omit doing it. The word 'willfully,' says Chief Justice Shaw, in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose. (28 Pick. 220.)

" 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' (1 Bishop Cr. Law, §428.) "

Potter v. United States, *supra*.

We call attention to the evidence offered by the Government of the collateral transactions of 1886-1887, and to the remarks made to the jury con-

cerning the same. (R. 56-61.) Also to the refusal of the court to charge the jury that if the defendant relied in good faith upon the statements of the cashier as to the condition of Dobbins & Dazey's account, believing those statements to be true, he would have the right to do so "if the cashier was reputed to be, and believed by the defendant to be a man of honesty and truth. (R. 64.) *The court insisted upon striking out the word "truth," and substituting, "right conduct as respects the affairs of the bank."* Therefore, under the instruction of the court, if the cashier was believed by the defendant "to be a man of honesty and truth," the defendant had no right to rely upon his statements; he could only rely upon them "if he was a man of honesty and right conduct as respects the affairs of bank," the court having already remarked in the presence of the jury that the transactions of 1886-1887 were admissible as affecting the defendant's right to rely on the representations made by the cashier. (R. 56.)

The court charged the jury:

"The Government is bound, in order to maintain any of the counts in these indictments, to prove:

"First, that the defendant certified the check.

"Second, that the drawers of the check had

not sufficient funds in the bank to meet such check.

"Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained, and its modification stated, further on." (R. 148.)

When the court gave that part of the charge, it should, at the same time, have called the attention of the jury to the language of § 13 of the act of 1882, imposing the penalty upon one "*who shall willfully violate § 5208 of the Revised Statutes.*" At least, the court should have carried out its expressed intention of explaining "the last element of the offense," as the word is defined and explained in *Potter v. United States, supra*. Instead of explaining and modifying "the last element of the offense" further on in its charge, the trial court, in our view, never directly charged the jury that to willfully certify a check meant *not merely that the defendant certified the check when sufficient funds were not in the bank, but that he certified it "willfully," that is, with a bad purpose — with an evil intent, without justifiable excuse.*

The court did not directly charge the jury, in referring to the affirmative act of defendant certifying the check, *that the word "willfully" "im-*

plied on the part of the defendant knowledge and a purpose to do wrong,"—a determination with bad intent to commit the wrong.

Potter v. United States, supra.

The defense of the defendant was, that he was not a bookkeeper; that he had no practical knowledge of bookkeeping; that he gave his attention to working up custom and patronage; and that he had no knowledge, at the time of the certification of the checks, that the drawers thereof had not sufficient funds on deposit in the bank to meet them, but, on the contrary, that he had

the time, information from the cashier and a clerk of the bank that the drawers had ample funds on deposit to meet the checks, and that he honestly relied upon this information in certifying the same. Therefore, instead of defining the offense within § 13 of the act of 1882, early in the charge the trial judge observed to the jury, that "this last element of the offense" (knowledge), would be explained and its modification stated further on.

Soon after, the court said in its charge :

"Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawers

was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks." (R. 148.)

"These checks before their certification, were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. *It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it.* But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith, would not render him guilty." (R. 149-150.)

Further on the court said:

"But I further charge you, that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and when the president assumed to

certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn." (R. 151.)

Our contention is, that instead of explaining "this last element of the offense," referred to near the opening of the charge, the court not only omitted so to do, but gave erroneous instructions thereof. Clearly these instructions were calculated to mislead and confuse the jury. These parts of the charge, we insist, are applicable only to civil responsibility, and are not applicable to an offense charged under § 13 of the act of 1882. Section 5208 of the Revised Statutes, "carries with it no penalty against the wrong-doing officer."

Potter v. United States, supra.

The presence of the word "willful" in said section means something.

"While it is true that care must be taken not to weaken the wholesome provisions of the statute designed to protect depositors and stockholders against the wrong-doings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with utmost honesty and in a sincere belief that no wrong was being done, criminal offenses."

Potter v. United States, supra.

"As willful wrong is the essence of the accusation," the charge of the court should have directed the jury to the willful violation of the statute; and in explaining the "last element of the offense," the trial court should have charged the jury that the defendant, in certifying the checks, knew that there were no funds of the drawers in the bank sufficient to meet them, and willfully certified the same with a bad purpose,—with an evil intent, without justifiable excuse. Instead of explaining the "last element of the offense" within the terms of said §13 of the act of 1882, as construed in *Potter v. United States*, *supra*, the instructions given shifted the burden of proof of the Government upon the defendant, because if "it was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn," and if, "from the existence of such a duty you may draw an inference of fact [in a criminal case] that he did so inform himself, if he did not already know it," then the jury, upon the proof of the Government that defendant had, as president of the bank, certified the checks, and that the drawers of the

checks had not sufficient funds in the bank to meet the same, must necessarily have convicted defendant under said § 13 of the act of 1882, because it was his duty before certifying checks to inform himself of the state of the account on which they were drawn; and from the existence of such duty, the jury might draw the inference of fact that he did so inform himself. Under such a charge, an officer of a bank, who voluntarily certifies a check, where the drawer thereof has not sufficient funds in the bank to meet the same, may be convicted without any other proof tending to show that he "willfully violated the provisions of § 5208 of the Revised Statutes"; *i. e.*, that he certified the check with a bad purpose,—with an evil intent, without justifiable excuse. In brief, that he is guilty of "a willful wrong. This is the essence of the accusation." We contend, as we did in our former brief, that the court erroneously applied to the defendant, in its charge to the jury, the rules and principles of civil, and not those of the criminal responsibility.

"Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation, for what a man is bound to know, he shall be held to have

known, but that has no place at all when a man is charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you can convict."

Vice-Chancellor McCoun, in *Scott v. Depeyster*, 1 Edw. Ch. 513.

Briggs v. Spaulding, 141 U. S. 162.

In the last case, the Chief Justice, speaking for this court, observed :

"They [the subordinates] must be supposed to act honestly until the contrary appears, and the law does not require their employers to entertain jealousies and suspicions without some apparent reason."

It is true that the trial judge charged the jury that the Government must establish the defendant's knowledge of the state of Dobbins & Dazey's account beyond a reasonable doubt ; but, in view of his remarks and his instructions concerning the evidence of the collateral matters of 1886-1887, the jury evidently believed that he had no right to rely upon the statements of the cashier concerning such account, if those transactions referred to were believed. As the trial court charged the jury "that it was the defendant's duty, before certifying the checks, to inform himself fully

of the state of the account on which they were drawn, and that from the existence of such duty the jury might draw an inference of fact that he did so inform himself," and as it was not denied that the account of the drawers was overdrawn when the certifications took place, of necessity, under such a charge, the jury would believe that the Government had established the defendant's guilty knowledge of the state of Dobbins & Dazey's account, beyond a reasonable doubt.

The Court of Appeals cites in support of its opinion upon this point, *Insurance Company v. Pendleton*, 115 U. S. 339-344; *Finn v. Brown*, 142 U. S. 71; and *Agnew v. United States*, 165 U. S. 36-49.

Insurance Company-Pendleton, supra, was a civil action, and the discussion therein of the duties of the officers of a bank has no application whatever to a criminal liability.

Finn-Brown, supra, was also a civil action to enforce an individual liability against a stockholder, and recover a fraudulent dividend. No question of criminal law or of criminal responsibility is discussed therein.

Agnew-United States, supra, was an appeal from a conviction for violation of § 5209 of the Revised Statutes. The facts were very different from the case at bar, and we cannot find language in the opinion handed down supporting the theory that in a criminal action under § 13 of the act of 1882 from the existence of an official duty, a jury may draw an inference of guilty knowledge, of bad faith, of an evil intent without justifiable excuse. (See R. 130.)

In that case it was expressly stated :

“Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial.”

In view of the extensive remarks of the trial court concerning the principles of civil responsibility, we contend that not only was the charge erroneous in the parts referred to, *but that, in any event, this court must declare the same misleading and confusing.*

Dow v. United States, 49 App. 606. (82 Fed. Rep. 904-8).

Coffin v. United States, 156 U. S. 432-463.

In the opinions handed down in the last cases cited, the misleading and confusing nature of a charge is commented upon.

We insist that, not only did the trial court omit to explain properly and sufficient "this last element of the offense," but that the explanation or modification thereafter given tended to relieve the Government of the burden of showing direct knowledge—guilty knowledge—a bad purpose—evil intent on the part of the defendant in certifying the checks. The jury was permitted to find a verdict of guilty upon inferences on account of a duty of the defendant from a constructive knowledge, because he was an officer of the bank, and was therefore bound to know the condition of the bank, and the accounts of depositors, or at least, the account of Dobbins & Dazey, at the time he certified their checks.

In order to charge an officer with doing an act criminally, which he knows to be false, some fact or circumstance must be proven that it was in bad faith, willful, or for some fraudulent purpose.

Pierce v. Hanmore, 86 N. Y. 103.

Stebbins v. Edmunds, 12 Gray, 203.

State v. Massey, 97 N. C. 465.

United States v. Ross, 92 U. S. 281.

See also, the other authorities cited in our principal brief.

That the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial, see —

Agnew v. United States, 165 U. S. 49.

Lilienthal's Tobacco v. United States, 97 U. S. 266.

Stokes v. People, 53 N. Y. 164.

People v. Millard, 53 Mich. 70.

People v. Fairchild, 48 Mich. 32-37.

Wharton v. State, 73 Ala. 368.

State v. Conway, 55 Kansas, 323, where it was held that "An instruction which inferentially places the burden of proof upon the accused," is *erroneus*.

In *Briggs v. Spaulding*, 141 U. S. 132, it was remarked in reference to the conduct of the president and directors of a bank, that "Their conduct is to be judged not by the event, but by the circumstances under which they acted.

See also, *Wakeman v. Daley*, 51 N. Y. 27-32.

Murray v. Nelson Lumber Company, (Sup. Ct. Mass.) 9 N. E. Rep. 634.

We again call attention to what occurred when the jury, after deliberating some hours, returned and handed to the court a paper reading: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." (R. 53-4.) (Former brief, pp. 96-103.)

Thereupon, the court read a part of § 5208 of the Revised Statutes, and then inquired of the jury, "Does this answer your question?" The foreman said, "Yes, sir." The court again read a part of said § 5208, and made the following, among other, comments:

"I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there is no funds there to meet it.

"You understand what I have said now is to be taken in connection with what I have before instructed you." (R. 53.)

As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882, making it a misdemeanor to willfully violate the section of the Revised Statutes which the court had read to

them, and that the court ought to read and explain that act to the jury. The court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that. (R. 54.)

In defense of the action of the trial judge in reading twice § 5208 of the Revised Statutes, and in refusing, as requested by counsel for defendant, to read in connection therewith § 13 of the act of 1882, counsel for the Government observe in their brief on page 97 that "The jury did not ask for the law prescribing the penalty for false certification, because it was no part of their function to fix the penalty. The court, therefore, properly declined to read that law to them." Counsel for the Government, therefore, contend that the remark of the trial judge, "that the jury had nothing to do with that" (§ 13 of the act of 1882), was properly made.

Without the act of 1882, the defendant could not have been indicted or convicted under any statute of the United States. This court has said that the presence of the word "willful" in said § 13 of the act of 1882 "cannot be regarded as

mere surplusage; it means something more. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required that an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law."

Potter v. United States, supra.

The defendant was being tried for having "*willfully*" violated certain provisions of the statute. It goes without saying, that the word "*willful*," embraced in the act of 1882, must have been discussed before the court and jury in the argument of counsel. Indeed, in the opening statement of counsel for the Government to the jury, he said he expected to prove "that Spurr certified the checks of Dobbins & Dazey willfully or with bad intent to injure the bank." (R. 54.)

Evidently the jury in making the request they did, wanted to be further instructed concerning the law as to the certification of checks where there were no funds of the drawer in the bank adequate to meet the same as applicable to the case upon trial. It does not appear to us that the answer of the counsel for the Government

or of the Court of Appeals that "the assumption is negated by the answer of the jury," is sufficient. (R. 117.) The jury asked the trial judge for an instruction in a matter of law, and it was the duty of the judge to instruct them correctly. As § 5208 of the Revised Statutes was read twice, § 13 of the act of 1882 ought to have been read in connection therewith. It will not suffice to reply of § 13, as the trial court did in the presence of the jury, that as that act prescribes the penalty for false certification, the jury had nothing to do with it.

In this case, the jury had very much to do with that act. While the act imposes a penalty, it also embraces the word "willfully," and therefore under that act, on account of the word "willfully," a party can be convicted only, who willfully does an act therein referred to. *As "willful wrong is the essence of the accusation," the jury had very much to do with that act when properly expounded to them by the trial judge.* The fact that the foreman in answer to the question of the judge said, "Yes, sir," (R. 53,) does not cure the error we complain of.

All persons familiar with the trial of causes in the courts—especially in the Federal courts—

have had occasion to observe with what attention a jury listens to catch from the court the slightest indication of its views. This is particularly the case when matters of great doubt and difficulty are before them for decision. How, then, can it be known that the expression referred to of the trial judge, "that the jury had nothing to do with that" (meaning § 13 of the act of 1882), had not some influence in determining the final result? The more able and upright the court, the more likely are its intimations to have weight, and it is impossible to say that the jury may not have received their bias from the court's reading twice § 5208 of the Revised Statutes, and then, when requested so to do, failing to read and explain § 14 of the act of 1882.

Undoubtedly, after the trial judge had read to the jury § 5208 of the Revised Statutes, and then asked the jury, "Does this answer your question?" the foreman would have thought it were contemptuous for him to reply "No." The jury had asked the question of the learned trial judge; the court had given an answer thereto, and as a matter of course the foreman accepted that as correct, and said "Yes, sir."

As was said in our principal brief, whether the trial judge satisfied the jury or not is wholly immaterial. The question is, Did his instruction satisfy the law? We say it did not.

Again, after the trial judge had twice read to the jury § 5208 of the Revised Statutes, he further remarked, as already quoted :

“I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certified it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there is no funds there to meet it.

“You understand what I have said now is to be taken in connection with what I have before instructed you.” (R. 53.)

About the conclusion of the above remarks is the following :

“That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.”

These were nearly the last words that fell upon the ears of the jury when they were retiring for the second time to consider their verdict. They had deliberated some hours before, had returned to the court-room for additional information, and then were told by the trial judge in substance, "*that false certification is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*" This is not the law, and the jury must have been misled thereby.

It is true that the trial judge also remarked, "You understand what I have said now is to be taken in connection with what I have before instructed you," and therefore, it is insisted on page 87 of the brief of counsel for the Government, that "it is impossible for the jury to have supposed that the court on the occasion referred to intended to instruct the jury that the mere certifying by an officer of the bank when there are no funds there to meet it, constituted an offense under the statute."

In answer, we quote from *Horne v. State*, 1 Kan. 42-73, as applicable :

"It was urged in argument that the court had in other parts of the charge given the true rule of law as applicable to this point, but as this was

a separate charge, it is impossible for us to say that it was not the controlling one with the jury. . . . We are not insensible to the consideration that the court, having once ably and clearly given the true law, the probabilities are that little of essential injury may have been sustained by the defendant by this misdirection. But we have no right to consider probabilities in reference to a single case when called upon to apply the general principles of established law and to register a precedent for the future actions of courts."

In the case at bar, however, we do not concede that the trial court gave the correct law in its charge to the jury. Therefore, in this case we insist the fair conclusion is, that the language of the trial judge about false certification as last stated by him was not only controlling with the jury, but was the direction to the jury which caused the verdict of "guilty" to be rendered.

III.

DEFENDANT OFFERED EVIDENCE THAT HE HAD NO KNOWLEDGE OF THE OVERDRAFT OF DOBBINS & DAZEY AT THE TIME HE CERTIFIED THE CHECKS, AND YET THE TRIAL COURT REFUSED AN INSTRUCTION COVERING HIS THEORY OF THE CASE, SUPPORTED BY POSITIVE EVIDENCE.

Defendant prayed the court to give the following special instruction, being the fifth of its requests :

“ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty, and you should acquit him.” (R. 50, 51.)

Which instruction the court declined to give, but modified it by adding certain words, and gave it as thus modified (the added words appearing in brackets), as follows :

“ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered

by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks [besides the overdraft then existing], then he is not guilty, and you should acquit him [unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions]." (R. 51.)

To the modification by adding the words " besides the overdraft then existing," the defendant duly excepted. (R. 152.)

The instructions given and refused are placed side by side for comparison in our former brief, on page 91 thereof. The modification, " besides the overdraft then existing," in our view was erroneous and misleading.

The verdict was decided by the trial judge to be applicable to " a check certified by the defendant, dated January 3, 1893," and the defendant was sentenced for two years and six months to the penitentiary for the false certification of that check. (R. 8.)

The undisputed evidence shows that Dobbins & Dazey deposited upon that day in the Commercial

National Bank \$79,941.25, and they only checked out \$40,551.50. (R. 28, 147.) The check of Dobbins & Dazey certified to on January 3, 1893, was for \$40,000. (R. 147.)

The instructions prayed for, among other things asked the court to direct the jury :

“And that, having no knowledge of the overdraft of Dobbins & Dazey’s account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him.”

As given, the instruction was as follows :

“If you find that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, in addition to the existing overdraft, he would not be guilty under the indictment, and you should acquit him.”

The defendant was entitled to have an instruction to cover his theory of the case upon the affirmative evidence introduced by him in support thereof. Under the evidence given in his behalf, the modification of the instruction prayed for by adding thereto "in addition to the existing overdraft," must necessarily have impressed the jury prejudicially against the defendant.

If the defendant, when he certified the check of \$40,000 on January 3, 1893, had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited by Dobbins & Dazey that day and was in the bank to cover the check certified, he clearly would not be guilty under any construction of § 13 of the act of 1882. The defendant had testified that he had no knowledge of the overdraft of Dobbins & Dazey, and yet, having given that testimony, he was refused an instruction by the trial court which covered the facts of the case as testified to. In effect, the instruction, as modified, informed the jury that the defendant, in order to be innocent, must have seen that provision was made for the overdraft, although he had testified he was directly ignorant of it. The instruction directed the jury, in substance,

that the defendant was only entitled to acquittal in the event that the deposit amounted to the check certified and the overdraft existing upon the books, whether he knew of the overdraft or not. It held him to the knowledge of the overdraft, although the jury should find that he had no such knowledge actually, and although such knowledge could not be imputed to him from his "shutting his eyes to the facts," etc., as stated by the court.

As we view it, the modification of the instruction by the trial judge makes absolute the inference of defendant's knowledge of the state of the account, which the court elsewhere instructed the jury they might find from his duty to know it; and this, too, though the jury should find that he had no such knowledge and was otherwise not chargeable with such knowledge.

The Court of Appeals, in the opinion handed down, said :

"The purpose of the modification was to preclude such a misconception of the defendant's duty, and to bring the request into harmony with the statute and the general charge definitive of that duty." (R. 116.)

The language of the Court of Appeals is not

satisfactory to us on this point, and we think does not express a correct view of the law. *It seems to us that it overlooks the well-recognized rule that where positive evidence is offered upon the trial in support of the defense relied upon, the defendant is entitled to have an instruction embracing the law applicable to such evidence, leaving to the jury the weight to be given to the evidence.* (R. 126-144.)

IV.

VERDICT UNCERTAIN AND INSUFFICIENT.

The form of the verdict rendered was: the jury "upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the court." (R. 5.)

Thereon the court sentenced the defendant upon a check dated January 3d, 1893. (R. 8.)

A motion in arrest of judgment was filed, argued, and submitted. (R. 6.)

The defendant was tried before Judge SEVERANCE, for falsely certifying four checks. (R. 147, 148.)

Counsel for the Government refer to the verdict on page 128 of their brief, and attempt to give a construction thereof embracing several pages of the brief. (R. 129-133.)

The indictments contained several counts. The motion of the United States District Attorney asked "for sentence upon the verdict of the jury heretefore rendered, upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, counts Nos. 1 and 4 of indictment No. 7994,

count No. 3 of indictment No. 8139, count No. 2 of indictment 8078, and count No. 5 of indictment No. 8139." (R. 7.)

Indictment No. 7994 had more than one count, and indictment No. 8139 had several counts. The court seems to have selected count 3 of indictment No. 8139 upon which to render sentence. In the construction of this verdict, the counsel for the Government contend that "on the three last certified checks" is superfluous, and should be stricken out of the verdict. We quote as follows from the brief of the Government :

"THE VERDICT IN THIS CASE.

"*'We, the jury, find the defendant guilty, on the three last certified checks, and recommend him to the mercy of the court.'*

"The words *italicized* constitute a general verdict of guilty on all counts. (160 U. S. 197, *Bal-
lew v. United States* ; 157 U. S. 279, *Statler v.
United States*.)

"The words in parentheses are 'superfluous,' and striking them from the verdict leaves it in all respects complete and responsive to the charge. (157 U. S. 279, *Statler v. United States*.)

"The words 'as charged in the indictment' would have been supplied by construction. (157 U. S. 279, *Statler v. United States* ; 154 U. S. 154, *St. Clair v. United States*.)

"The words in parentheses, while *superfluous*

in law, are suggestive or advisory, to the court, as to the punishment."

Counsel seemed to think it necessary to strike out "on the three last certified checks," to make the verdict read definite and certain. But this construction is a strained one. We cannot ignore "the three last certified checks" contained in the verdict. We might as well ignore the word "guilty" as the words "on the three last certified checks."

An examination of the citations does not support the construction attempted to be given to the verdict. In *Ballew v. United States*, 157 U. S. 160-197, the defendant was charged "with wrongfully withholding from a pensioner of the United States part of a pension allowed and due her," and also for "demanding and receiving as agent greater compensation for services than is provided by the Revised Statutes." The verdict was a general verdict. In that case, the court held that there was error as to the conviction of the defendant of one of the offenses charged, but there was no error in the conviction upon the other. In that case, the general judgment of the court below was reversed by this court, and the case remanded

with instructions to enter judgment upon the second count of the indictment.

In *Statler v. United States*, 157 U. S. 279, the verdict was "guilty in the first count for having in possession counterfeit minor coin." This court held the verdict to read "guilty in the first count," and ignored "for having in possession counterfeit minor coin." There were several counts in the indictment, and the court very properly ruled that the verdict of the jury applied only to the first count. But if the construction to the uncertain verdict in this case be given, as contended for on page 131 of the brief of the Government, then the verdict of the jury would be construed as making the defendant guilty upon all the counts of the indictments under which he was tried. This is not a fair construction, nor a proper one.

In *St. Clair v. United States*, 154 U. S. 1002, this court held "that on an indictment for murder, a verdict of guilty is sufficient as referring to the single offense charged." This and nothing more.

Therefore, an examination of the authorities cited at the bottom of page 131 and at the top of page 132 of the brief of the Government will not,

in our view, sustain the argument that the words in the verdict "on the three last certified checks," must be wholly ignored. With these words retained in the verdict, there is difficulty in deciding definitely which of the checks described in the various indictments the jury referred to in the verdict.

In indictment No. 8139, the check of January 3d, 1893, is in the third count. Yet there are several other counts in the same indictment. It is evident from the lengthy discussion of the verdict by the learned counsel representing the Government, that such verdict is not definite and certain upon its face, and therefore a labored effort is made in several pages of their brief to construe the same. If the verdict is not sufficiently certain upon which to render the sentence complained of, then of course defendant's motion for arrest of judgment should have been sustained. (R. 6.)

The charge of the United States Circuit Judge appears on pages 146-157 of the record. The opinion of the United States Circuit Court of Appeals, handed down June 1st, 1898, is printed on pages 104-123 of the record. The argument

and authorities presented on behalf of the defendant in error for a rehearing in the Court of Appeals appears in the record on pages 124-144.

This brief is supplemental to our principal brief, and is to be read and considered in connection with that brief and with the authorities there cited.

Respectfully submitted.

ALBERT H. HORTON,

One of the Counsel for Marcus A. Spurr.

MARCH 8, 1899.

No. 448.

Brief of Atty. Gen. (Richard) for
Respondent.

Office Sec'y & Clerk U. S.
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Clerk.

Filed Oct. 31, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

MARCUS A. SPURR, PETITIONER, }
v. } No. 448.
THE UNITED STATES. }

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

| | |
|------------------------------|------------|
| MARCUS A. SPURR, PETITIONER, | } No. 448. |
| <i>v.</i> | |
| THE UNITED STATES. | |

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Spurr, formerly president of the Commercial National Bank of Nashville, Tenn., was, in April, 1896, convicted in the circuit court of the United States for the middle district of Tennessee, of a violation of section 5208, Revised Statutes, for unlawfully certifying checks.

The trial was before Judge Severans, and was the third trial. The first trial took place before Judge Sage, and the second before Judge Taft, both resulting in disagreements of the jury. After conviction, a motion in arrest of judgment was argued, which was overruled in December, 1896, and sentence pronounced. The case was then carried on error to the circuit court of appeals, Judges Barr, Ricks, and Swan sitting, which, on June 1, 1898, affirmed the judgment of the circuit court. A motion for rehearing was overruled on October 8, after which this application for a writ of certiorari was made to this court.

It is unnecessary to repeat what I have said in the Gardes and Gallot cases in opposition to the granting of writs in cases of this nature. Spurr's defense was conducted with great zeal and ability, and every question that could be was raised and reserved. All these questions were brought before the circuit court of appeals, and there fully argued and carefully considered. A reading of the opinion of the court (87 Fed. Rep., 701) is convincing upon the point that no novel or important question was or is involved, and that no reason exists for taking this case out of the law that makes the decision of the circuit court of appeals final. The exceptions were the usual ones taken in such cases—exceptions to the admission of testimony, exceptions to certain charges of the court, and certain refusals to charge as requested. The decision of the circuit court of appeals upon these questions was clearly correct. There is nothing in the application for the writ of certiorari nor in the record in the case which in any wise successfully impugns the concluding statement of the circuit court of appeals (87 Fed. Rep., 714):

A careful examination of the record satisfies us that the defendant has had a fair trial, and that, both in the rulings upon the evidence and in the submission of the case to the jury, his rights were carefully protected.

JOHN K. RICHARDS,
Solicitor-General.

OCTOBER 26, 1898.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

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| MARCUS A. SPURR, PETITIONER, | } | No. 448. |
| <i>v.</i> | | |
| THE UNITED STATES. | | |

BRIEF AND ARGUMENT FOR THE UNITED STATES.

Three indictments were found against the defendant, Marcus A. Spurr, in the the circuit court of the United States for the middle district of Tennessee.

The indictments were for violation of section 5208 of the Revised Statutes. That section provides:

It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

By section 13 of the act of Congress approved July 12, 1882, it is provided:

That any officer, clerk, or agent of any national banking association who shall willfully violate the

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provisions of an act entitled "An act in reference to certifying checks by national banks," approved March 3, 1869 (being section 5208 of the Revised Statutes of the United States), or shall resort to any device or receive any fictitious obligation, direct or collateral, in order to avoid the provisions thereof, or who shall certify checks before the amount shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.

Under this statute the defendant was indicted for willfully, unlawfully, and knowingly certifying as president of the Commercial National Bank of Nashville, Tennessee, certain checks drawn upon that bank by Dobbins & Dazey, he well knowing that said Dobbins & Dazey did not have on deposit with the bank at the times when the checks were certified, respectively, an amount of money equal to the amount specified in said checks, respectively.

The Commercial National Bank of Nashville, Tennessee, was organized in 1884. The defendant, Marcus A. Spurr, was president, and one F. Porterfield was cashier from its organization to the time of its failure, on March 25, 1893. The original capital stock was \$200,000, and the capital stock at no time exceeded \$500,000.

The firm of Dobbins & Dazey were engaged in the purchase, sale, and exportation of cotton. Its financial standing and credit was of the very best; but its assets

consisted only of money, choses in action, and cotton on hand and in transit.

The three indictments against the defendant, each containing several ~~counts~~ counts, were consolidated and tried together.

They covered four checks of different dates, all drawn by Dobbins & Dazey on the Commercial National Bank; and they were all dated and certified between December 9, 1892, and February 13, 1893.

Said checks were as follows:

| | |
|---------------------------------------|-------------|
| One dated December 9, 1892, for..... | \$15,000.00 |
| One dated December 17, 1892, for..... | 31,000.00 |
| One dated January 3, 1893, for..... | 40,000.00 |
| One dated February 13, 1893, for..... | 9,641.95 |

In addition to the above checks, covered by the indictments, the defendant certified the two following checks, not covered by the indictments, viz:

| | |
|--------------------------------------|------------|
| One dated January 24, 1893, for..... | 3,000.00 |
| One dated January 24, 1893, for..... | 11,724.89 |
| Total..... | 110,366.84 |

In short, the defendant, as president of said bank, between December 9, 1892, and February 13, 1893 (a period of sixty-six days), certified checks of Dobbins & Dazey upon said bank amounting to \$110,366.54.

These checks of Dobbins & Dazey certified by the defendant during a period of only sixty-six days aggregated more than one-fifth of the entire capital stock of the bank, and, as will be seen further on, there was at no time during that period money on deposit by Dobbins & Dazey to pay them.

It was admitted by defendant on cross-examination that he could not recollect that he had ever certified a check for anyone except Dobbins & Dazey for as much as \$10,000. And upon examining the ledgers, which were placed before him, and which contained the certified check account, as kept by said bank from July 11, 1890, to the failure of the bank in 1893, the largest certified check that he could find in said account was for \$9,198.63.

With but one exception every check of Dobbins & Dazey, certified by the defendant, was larger than the largest check of any other person that had been certified by the bank during the entire period from July 11, 1890, to the failure of the bank in March, 1893.

The evidence in this case shows that at the time Dobbins & Dazey placed their account with the Commercial National Bank in October, 1891, it was understood by the executive committee and by the defendant, who was a member of said committee, that the business of Dobbins & Dazey was one of great magnitude.

The defendant objected to taking the account, because he thought that owing to its magnitude and the course of business of Dobbins & Dazey the bank might not always be able to provide sufficient cash funds, without inconvenience, to carry the account. R. H. Dudley, another member of the committee, objected to the account upon the same ground and also on the ground that he (Dudley), having been in the cotton business himself, believed that Dobbins & Dazey would be likely to overdraw their account. And when the account of Dobbins & Dazey

was finally taken by the bank, the cashier was directed by the committee, in the presence of defendant, not to allow them to overdraw their account nor to borrow more than their line of credit, and not to discount their drafts without bills of lading attached; and the cashier promised to comply with their directions.

Soon after the account of Dobbins & Dazey was taken by the bank the defendant inquired of Porterfield as to how Dobbins & Dazey was getting along; and in response to the inquiry Porterfield told him that the account had been overdrawn, but that it had been made good.

There was evidence given at the trial that during the entire period covered by the dates of the above-mentioned six checks, that were certified by the defendant, the account of Dobbins & Dazey in said bank was continuously and largely overdrawn upon the individual ledger, with the exception of one day in January, 1893, when there was a small credit balance; that the overdrafts or debit balances on each day were shown upon the individual ledger in red ink, and credit balances in black ink; that said overdrafts varied largely in amount, running from \$4,495.90 to \$122,593.29; that on the several days upon which the above-mentioned checks were certified by the defendant the account of Dobbins & Dazey was overdrawn in said bank on the individual ledger; and that they, the said Dobbins & Dazey, had no funds or moneys on deposit in said bank with which to meet the checks.

The state of the account of Dobbins & Dazey on the dates of the said several certifications by defendant, and on preceding and succeeding days, as appeared by the

individual ledger of the bank, were shown to be as follows:

| | |
|---|----------------|
| Overdraw at close of business December 8, 1892..... | \$114, 194. 01 |
| Deposited December 9, 1892..... | 50, 153. 30 |
| Checked out December 9, 1892 | 377. 26 |
| Overdrawn at close of business December 9, 1892 | 64, 417. 97 |
| (CHECK OF DOBBINS & DAZEY, DATED DECEMBER 9, 1892, CERTIFIED BY DEFENDANT FOR \$15,000.) | |
| Deposited December 10, 1892 | 13, 972. 00 |
| Checked out December 10, 1892 | 42, 407. 48 |
| Overdrawn at close of business December 10, 1892 ... | 92, 853. 45 |
| Overdrawn at close of business December 16, 1892 ... | 19, 503. 74 |
| Deposited December 17, 1892, <i>nothing</i> . | |
| Checked out December 17, 1892..... | 31, 568. 91 |
| Overdrawn at close of business December 17, 1892 ... | 51, 072. 65 |
| (CHECK OF DOBBINS & DAZEY, DATED DECEMBER 17, 1892, CERTIFIED BY DEFENDANT FOR \$31,000.) | |
| Overdrawn at close of business January 2, 1893..... | 77, 515. 59 |
| Deposited January 3, 1893..... | 79, 941. 25 |
| Checked out January 3, 1893 | 40, 551. 50 |
| Overdrawn at close of business January 3, 1893..... | 38, 125. 84 |
| (CHECK OF DOBBINS & DAZEY, DATED JANUARY 3, 1893, CERTIFIED BY DEFENDANT FOR \$40,000.) | |
| Overdrawn at close of business January 23, 1893..... | 62, 153. 37 |
| Deposited January 24, 1893..... | 889. 47 |
| Checked out January 24, 1893 | 22, 982. 50 |
| Overdrawn at close of business January 24, 1893..... | 84, 256. 46 |
| (ONE CHECK OF DOBBINS & DAZEY FOR \$3,000, AND ONE FOR \$11,724.89, BOTH DATED JANUARY 24, 1893, CERTIFIED BY DEFENDANT.) | |
| Deposited January 25, 1893, <i>nothing</i> . | |
| Checked out January 25, 1893 | 38, 336. 89 |
| Overdrawn at close of business January 25, 1893..... | 122, 593. 29 |
| (BOTH OF THE CHECKS DATED JANUARY 24, 1893, CERTIFIED BY DEFENDANT, WERE STAMPED "PAID JANUARY 25, 1893.") | |

| | |
|---|-------------|
| Overdrawn at close of business February 11, 1893..... | \$49,454.69 |
| (February 12 was a holiday.) | |
| Deposited February 13, 1893..... | 4,589.78 |
| Checked out February 13, 1893 | 23,378.82 |
| Overdrawn at close of business February 13, 1893.... | 68,243.73 |
| (CHECK OF DOBBINS & DAZEY, DATED FEBRUARY 13, 1893, CERTIFIED BY DEFENDANT FOR \$9,641.95.) | |
| Deposited February 14, 1893. | 34,965.00 |
| Checked out February 14, 1893 | 39,641.95 |
| Overdrawn at close of business February 14, 1893.... | 72,920.68 |

In other words, on December 9, 1892, at the close of business the individual ledger of the bank showed that Dobbins & Dazey's account was overdrawn in the sum of \$64,417.97, and on that day the defendant certified that firm's check for \$15,000.

At the close of business December 17, 1892, Dobbins & Dazey's account was overdrawn in the sum of \$51,072.65, and on that day their check for \$31,000 was certified by the defendant.

At the close of business January 2, 1893, Dobbins & Dazey's account was overdrawn \$77,515.59, and at the close of business the next day, \$38,125.84, on which day defendant certified their check for \$40,000.

At the close of business January 24, 1893, the account of Dobbins & Dazey was overdrawn \$84,256.46, and on that day the defendant certified two checks of Dobbins & Dazey—one for \$3,000 and one for \$11,724.89.

At the close of business January 25, 1893, the account of Dobbins & Dazey was overdrawn \$122,593.29, and both of the checks dated January 24, 1893, and certified by the defendant, were stamped, "Paid January 25, 1893."

At the close of business February 11, 1893, Dobbins & Dazey had overdrawn their account \$49,454.59 (February 12 was a holiday), and at the close of business February 13, 1893, their account was overdrawn \$68,243.73. On that day the defendant certified their check for \$9,541.95.

The Government's evidence tended to show directly that Frank Porterfield, the cashier, and all the employees of the bank below the cashier, had knowledge of the condition of Dobbins & Dazey's account, and of the fact that it was continuously and largely overdrawn during the period covered by the checks certified by the defendant.

The defendant, on cross-examination, was unable to give the name of a single person who worked in that bank, from the porter who swept the floor to the defendant, who was president of the bank, who did not know that Dobbins & Dazey's account was largely and continuously overdrawn; though the defendant stated that *he did not know* the fact, notwithstanding he was the *highest officer* in the bank.

The evidence showed that the defendant was very intelligent and an exceedingly good business man; that he worked up custom and patronage for the bank; secured influential men for the directory; corresponded with country banks; secured their accounts, and entertained their officials when visiting the city. He secured the business of new corporations which were being organized; and he settled, collected, or secured such bad and doubtful debts as were referred to him for that purpose by the directors or committees of the bank. He had a

desk in the directors' room in the rear end of the banking house. He had access to the books of the bank, and was frequently among the clerks and bookkeepers in the front part of the banking house, where the books were kept, making inquiries concerning various matters and accounts from time to time.

There was evidence showing that where a check was presented to the teller, and he knew that the drawer had the money to his credit in the bank, the custom was for the teller to certify the check without referring it back to the cashier or anyone else. There was no evidence that any of the checks certified by the defendant were ever presented to the teller.

The defendant, instead of following the custom of the bank in certifying checks, and instead of requiring said checks to be presented to the teller for certification, assumed to certify them himself, and he admitted, on cross-examination, that he had certified checks for persons other than Dobbins & Dazey.

He stated that when he certified checks for persons other than Dobbins & Dazey he went wherever he thought he could get the information—to the teller or bookkeeper.

He was then asked this question: "Suppose I had an account with the Commercial National Bank and I wanted you to certify a check, who would you, in the ordinary course of business, go to to find out whether or not you could certify that check?"

His answer was, "Either go to the bookkeeper or teller, and ask him what he knew about it."

He admitted, however, that when he certified the checks of Dobbins & Dazey he did not ask the teller or

the ledger bookkeepers of the bank if the account of Dobbins & Dazey was overdrawn.

He stated that when he certified the checks of Dobbins & Dazey he went to Porterfield with reference to them.

The Government anticipated that the defendant would claim that he got his information in regard to Dobbins & Dazey from Porterfield; and the Government, while not believing that Porterfield gave him the information which he says he got from Porterfield, undertook, as a part of its case in chief, to show why the defendant could not have relied, and did not, in fact, rely upon the information which he claims to have obtained from Porterfield in regard to the account of Dobbins & Dazey.

The Government introduced evidence tending to show that during and prior to the period covered by the dates of the checks certified by the defendant, one George A. Dazey, in the name of his firm of Dobbins & Dazey, was conducting a system of what is known among banks as "kiting," between Nashville and New York, and that his method of operation was as follows:

He would draw, in the name of Dobbins & Dazey, large drafts on the New York correspondents of his firm, John Monroe & Co., and Latham, Alexander & Co., bankers and brokers, and deposit and discount those drafts *without any bills of lading attached*, and take credit for the proceeds, *as cash*, on the account of Dobbins & Dazey in one or the other of the two banks of Nashville, in which they carried regular accounts, namely, the Commercial National Bank and the First National Bank.

Dazey would then draw, in the name of Dobbins & Dazey, checks on said Commercial National Bank or on

said First National Bank. Said checks were generally drawn in favor of the Fourth National Bank of Nashville (though sometimes they were drawn in favor of the American National Bank). They were then certified by the Commercial National Bank or by the First National Bank, and the Fourth National Bank or the American National Bank would transmit to New York by wire the money necessary to meet the drafts of Dobbins & Dazey maturing in New York. Those banks would then reimburse themselves by collecting the amount of the checks from the Commercial National Bank or from the First National Bank, as the case might be.

Dazey would then draw another set of drafts in the name of Dobbins & Dazey, without bills of lading attached, on the same drawees in New York, and take credit for their proceeds as cash in the Commercial National Bank or in the First National Bank. He would then draw a second set of checks on the Commercial National Bank or on the First National Bank. The second set of checks, like the first, would be drawn in favor of the Fourth National Bank, or the American National Bank; and they would be certified by the Commercial National Bank, or by the First National Bank.

The Fourth National Bank, or the American National Bank, would then transmit to New York, by wire, the amount necessary to meet the second set of drafts; and they would again reimburse themselves by collecting the second set of checks from the Commercial National Bank, or from the First National Bank, as the case might be.

The same process was repeated again and again ; the volume of such transactions continually increasing.

When each of said drafts was drawn upon John Monroe & Co., and Latham, Alexander & Co., Dobbins & Dazey were, according to their own books, largely overdrawn with the drawees.

During the period between September 6, 1892, and March 1, 1893, the Fourth National Bank transmitted to New York, for Dobbins & Dazey, on checks drawn by them on the Commercial National Bank, \$1,829,427.25, and transmitted \$1,633,524.25 on checks drawn by them on the First National Bank. When the Commercial National Bank failed on March 25, 1893, it had on hand drafts amounting to \$142,000, which had been drawn by Dobbins & Dazey on New York, and discounted and credited to them by the Commercial National Bank on February 27, 1893. Said drafts were protested for nonpayment on March 1, 1893, and have never been paid.

It will be seen that the greater part of said "kiting" process was carried on through the Commercial National Bank, of which the defendant was president.

It will be seen that said "kiting" process was carried on continuously for six months lacking only six days.

It will be seen that during that period said bank received and credited *as cash* drafts of Dobbins & Dazey to the amount of \$1,829,427.25, *which had no bills of lading attached*, and which were drawn upon persons in New York, with whom Dobbins & Dazey were already largely overdrawn.

During the same period checks drawn by Dazey in the name of Dobbins & Dazey on the Commercial National Bank were certified and paid by that bank to the amount of \$1,829,427.25.

Although said bank was, during that period, accepting and crediting, *as cash*, drafts of Dobbins & Dazey *which had no bills of lading attached*, and which were drawn upon persons in New York *with whom Dobbins & Dazey were already largely overdrawn*, the account of Dobbins & Dazey with the Commercial National Bank was at the times said checks were certified, largely and continuously overdrawn.

Within a period of six months this bank, with a capital stock of \$500,000, paid upon the checks of Dobbins & Dazey almost \$2,000,000, when at the time of almost every payment Dobbins & Dazey not only did not have the funds with which to pay them, but were then largely indebted to the bank on account of an overdraft.

The character of this banking was so criminally reckless that it must have been perfectly apparent to everyone engaged in it, and was so criminally reckless that the president of the bank, with a desk in the banking office within a few steps of a ledger which showed each day all overdrafts, must have known it, notwithstanding the fact that he testifies positively in this case that he did not know it.

The evidence tended to show that when the Fourth National Bank began to telegraph money to New York for Dobbins & Dazey, in the fall of 1892 (upon their checks certified by the Commercial National Bank), the

Fourth National Bank occasionally carried the checks over to the following day—that is, when they came in after 11 o'clock, they would be carried over and paid the next day; but later on this was changed, and the Fourth National Bank required that the checks be paid the same day, and before the money was telegraphed by it to New York.

In other words, the character of the transaction became so flagrant, that the Fourth National Bank refused to transmit money to New York upon the checks of Dobbins & Dazey, even though they were certified by the Commercial National Bank; and required that they should not only be certified, but actually paid by the Commercial National Bank, before the Fourth National Bank would telegraph the money to New York.

It will be seen that it was absolutely essential to the success of said “kiting” process, that the checks of Dobbins & Dazey on the Commercial National Bank should be *promptly and continuously* certified and paid; so as to induce the Fourth National Bank to transmit the money by wire to New York, with which to meet the maturing drafts.

If the checks which the defendant certified had not been certified, it is manifest that the “kiting” bubble would have burst at once.

It will also be seen that a conspiracy, which included only Dazey and Porterfield, would have been wholly inadequate for the purpose; because if Porterfield had happened to be sick, or out of the city for a single day, it would have been impossible to secure the certification and payment of checks drawn that day by Dobbins & Dazey

on the Commercial National Bank; the Fourth National Bank would, as a consequence, have refused to telegraph money to New York to meet the maturing drafts; the drafts would have been protested for nonpayment, and the "kiting" transaction would have been immediately exposed.

The defendant was, therefore, an essential factor in the conspiracy, so that if Porterfield should happen to be out of the bank when one of Dobbins & Dazey's checks should be presented, the defendant could certify it, and thus secure its payment, and the prompt transmission of the money by the Fourth National Bank to New York to meet the maturing drafts.

The motive which induced the defendant to become a party to the conspiracy is to be found in the evidence which tended to show that the defendant and Porterfield were each engaged in speculations in cotton futures through Dobbins & Dazey during the period covered by the dates of the checks certified by defendant and Porterfield *and without furnishing any margins*; and that the funds of the Commercial National Bank were used by Dobbins & Dazey in such speculations with the knowledge of defendant.

There was also evidence tending to show that certain officers of the First National Bank were speculating in cotton through Dobbins & Dazey during the period in which that bank was accepting the unsecured drafts of Dobbins & Dazey as cash, and was certifying Dobbins & Dazey's checks to carry out said "kiting" transactions.

It will be remembered that the First National Bank and the Commercial National Bank were the only two

banks that certified the checks of Dobbins & Dazey; and, as might have been expected, the evidence tended to show that certain officers of each of said banks were speculating in cotton through Dobbins & Dazey during the period in which the checks were being certified.

In further support of its contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not, in fact, rely upon any information which he claims was obtained by him from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that, commencing about two years after the Commercial National Bank was organized, and continuing with but slight interruptions, down to the failure of said bank, the defendant and said Porterfield were jointly engaged in speculations in stocks and bonds; and that the moneys of said bank were used in said speculations *with the knowledge and consent of the defendant*.

There was evidence tending to show that in 1886 and 1887 a large amount of the moneys and funds of the bank were used by Porterfield, as cashier, *with the knowledge of the defendant*, but without the knowledge or consent of the bank, its directors, or committees, to purchase, on speculations, stocks *for the joint account of himself and defendant*, and of other persons, in the name of the bank, or himself as cashier.

The evidence tended to show that on November 12, 1886, 200 shares Hocking Valley stock were sold through Kohn, Popper & Co., New York bankers and brokers; that it was sold at a net profit of \$424.46; one-half of

which was credited on the books of the bank to Porterfield, and one-half to the defendant.

That on November 26, 1886, 100 American Cotton Oil certificates were sold through Kohn, Popper & Co. at a net profit of \$980.58; one-half of which was credited to Porterfield, and one-half to the defendant.

That on December 16, 1886, 200 shares of Tennessee Coal, Iron and Railroad stock were sold through De Neufville & Co., New York bankers and brokers; that it was sold at a new profit of \$2,933.18; one-half of which was credited to R. S. Cowan (the assistant cashier of the Commercial National Bank); one-fourth was credited to Porterfield; and one-fourth to the defendant.

That on January 15, 1887, 1,200 shares (\$25 each) of Nashville and Chattanooga Railroad stock, and 300 shares Tennessee Coal, Iron and Railroad stock, were sold through Latham, Alexander & Co., New York bankers and brokers; that it was sold at a net loss of \$9,762.35; one-third of which was charged against Porterfield; one-third against R. S. Cowan; and one-third against defendant.

That for the one-third of the loss (\$9,762.35) just stated, namely, \$3,254.12, chargeable to the defendant, he gave his demand note to the bank on May 20, 1887, secured by certain collaterals.

That on December 10, 1889, the defendant took up said note with the proceeds of a demand note of that date for \$4,000, secured by collaterals.

That on March 16, 1893 (only nine days before the bank failed), the defendant took up the \$4,000 note with

the proceeds of a demand note of that date for \$5,500, secured by collateral.

It is true that all three of said notes were approved by the executive committee; *but the defendant did not at any time inform the executive committee, or the directors of the bank, that those notes, or any part of them, were given to cover losses on stock.*

Said note of \$5,500 is still unpaid. All the memoranda, tickets, and slips showing said purchases and sales, and the profits and losses, including the deposit tickets on which profits were credited to Cowan, and the defendant, were wholly in the handwriting of Porterfield.

The profits credited to the defendant from said sales of stock were credited to him on the books of said bank at the times of said sales; and afterwards they were credited on his pass book and drawn out by him.

There was evidence tending to show that defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses, that were shown upon the accounts, statements, tickets, slips and memoranda, made out by Porterfield in reference to said transactions.

The following sums of money, belonging to the Commercial National Bank, were remitted by Porterfield, as cashier, to be used as margins on stock transactions:

| | |
|--|------------|
| February 18, 1886, sent to Kohn, Popper & Co | \$1,250.00 |
| March 29, 1886, sent to Kohn, Popper & Co..... | 500.00 |
| April 10, 1886, sent to Kohn, Popper & Co..... | 1,500.00 |
| May 6, 1886, sent to Kohn, Popper & Co..... | 500.00 |
| May 11, 1886, sent to Kohn, Popper & Co..... | 500.00 |
| May 14, 1886, sent to Kohn, Popper & Co..... | 2,425.44 |
| June 12, 1886, sent to Kohn, Popper & Co | 605.10 |

| | |
|---|------------------|
| June 17, 1886, sent to Kohn, Popper & Co | \$1,000.00 |
| July 8, 1886, sent to Kohn, Popper & Co..... | 1,000.00 |
| August 31, 1886, sent to Kohn, Popper & Co..... | 2,000.00 |
| October 6, 1886, sent to Kohn, Popper & Co | 2,000.00 |
| October 27, 1886, sent to Kohn, Popper & Co | 1,000.00 |
| November 26, 1886, sent to De Neufville & Co..... | 5,000.00 |
| December 15, 1886, sent to De Neufville & Co. (through Latham, Alexander & Co.) | 10,000.00 |
| December 15, 1886, sent to De Neufville & Co. (through Herzfeld & Co.) | 5,000.00 |
| December 20, 1886, paid to De Neufville & Co. (by Latham, Alexander & Co., and charged to the Com- mercial National Bank) | 32,037.04 |
| Total | <u>66,317.58</u> |

In other words, there was evidence tending to show, that as far back as 1886-87, the defendant knew that Porterfield was misappropriating the moneys of the bank by using them to margin stock speculations in New York.

Though some of the stocks were bought for the customers of the bank, the profits or losses on the stocks mentioned above in this section, were divided equally between Porterfield and the defendant; or they were divided between Porterfield and the defendant and Cowan.

Porterfield made all the memoranda, tickets, and slips showing said purchases and sales, and the profits and losses; and the defendant accepted and used the exact amount of profits, and accounted for the exact amount of losses that were shown upon the memoranda or statements made out by Porterfield in reference to said transactions.

In brief, Porterfield acted as a bookkeeper to keep account of the profits and losses in which the defendant

participated; and defendant settled according to the divisions as made by Porterfield.

The evidence tended to show that the moneys of said bank were used by Porterfield in said transactions, with the knowledge and consent of the defendant; but without the knowledge and consent of the bank, its directors, or committees.

Four of said speculations resulted profitably; and in every instance the defendant's share of the profits were credited on his pass book, and drawn out by him.

The fifth transaction resulted in a loss, and the defendant, instead of paying his share of the loss in money, executed his note, which has been twice renewed, and it has been increased at each renewal. Neither at the execution of the original note, nor at the execution of the two renewals, did he inform the executive committee that they represented losses on stocks.

The Government insists that as far back as 1886-87, the defendant was bound to know, and did in fact know, that Porterfield was misapplying the funds of the bank. That the misapplication was not merely an act of technical *ultra vires*; but an intentional misuse of the bank's money in carrying speculative stock transactions, in which he and the defendant, the two chief officers of the bank, were participating, without the knowledge or consent of the directors and committees of the bank.

With the knowledge which the defendant thus acquired of Porterfield, as far back as 1886-87, he ought not to have relied, and could not, in fact, have relied upon any statement which he claims that Porterfield made to him in regard to Dobbins & Dazey's account.

In further support of his contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not, in fact, rely upon any information which he claims to have obtained from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that in March, 1889, an account styled "Frank Porterfield, separate," was opened by Porterfield with Herzfeld & Co., New York bankers and brokers; that said account was opened for the joint benefit of Porterfield and the defendant, and by previous arrangement and understanding between them; that a draft was drawn on Nashville for \$1,500, as a margin on said account; which draft was paid by defendant; that certain purchases and sales, made on said account, resulted in a profit of \$400, which was received by Porterfield on March 23, 1889, and which he subsequently divided with the defendant.

The evidence also tended to show that thereafter the following stocks were purchased, on said account for the joint account of Porterfield and the defendant, namely:

- 100 N. P. Co., bought June 4, 1890.
- 100 Mo. Pac., bought June 4, 1890.
- 100 Mo. Pac., bought June 6, 1890.
- 100 Tex. Pac., bought June 7, 1889.
- 100 Atchison, bought June 9, 1890.
- 100 L. & N., bought June 10, 1890.
- 100 Rich. Term., bought June 11, 1890.
- 100 N. West., bought June 11, 1890.
- 100 Chicago Gas, bought June 11, 1890.
- 100 Atchison, bought June 12, 1890.
- 100 L. & N., bought June 16, 1890.
- 100 C., C. & St. L., bought June 19, 1890.
- 100 Un. Pac., bought October 9, 1890.

- 100 Un. Pac., bought October 22, 1889.
- 100 N. P., preferred, bought October 25, 1889.
- 100 St. Paul, bought November 20, 1889.
- 100 St. Paul, bought December 9, 1889.
- 100 Un. Pac., bought March 20, 1890.

From the opening of said account in March, 1889, to August 18, 1890, there were purchased on it from time to time, 3,500 shares of stocks of various kinds, including those just mentioned.

Two hundred shares of Union Pacific on hand May 24, 1889, were sold, resulting in a net profit of \$1,290.52 over and above the margin of \$1,500; and on May 16, 1890, a check was received by Porterfield from Herzfeld & Co., for said profit (\$1,290.52), one-half the proceeds of which he placed to his own credit, and the other half to the credit of the defendant, on their respective individual accounts in the Commercial National Bank.

Said Herzfeld & Co.'s account also showed the following purchases of stock on said account, after September 15, 1890, namely:

- 100 shares Atchison, September 29, 1890.
- 100 shares Atchison, October 20, 1890.
- 100 shares C., C., C. & St. L., May 19, 1891.
- 100 shares Tenn. C. & I., June 5, 1891.
- 100 shares Ches. & Ohio, September 1, 1891.
- 100 shares West. Union, September 8, 1891.
- 100 shares Tenn. C. & I., October 2, 1891.
- 100 shares Mo. Pac., October 13, 1891.
- 100 shares Tenn. C. & I., October 14, 1891.
- 100 shares Mo. Pac., October 30, 1891.
- 100 shares L. & N., November 9, 1891.
- 100 shares Un. Pac., December 1, 1891.
- 100 shares Mo. Pac., December 2, 1891.

100 shares N. P. preferred, January 15, 1892.
 100 shares Un. Pac., January 21, 1892.
 100 shares N. Y. & N. E., January 21, 1892.
 100 shares N. Y. & N. E., January 25, 1892.
 200 shares Reading, January 26, 1892.
 100 shares L. & N., January 29, 1892.
 100 shares Rock Island, February 1, 1892.
 100 shares Wabash, preferred, February 3, 1892.
 200 shares Reading, February 3, 1892.
 100 shares N. Y. & N. E., February 4, 1892.
 100 shares L. & N., February 4, 1892.
 100 shares Tenn., C. & I., February 5, 1892,
 100 shares Un. Pac., February 9, 1892.
 100 shares Un. Pac., February 11, 1892.
 100 shares Atchison, February 17, 1892.
 100 shares Wab., preferred, February 18, 1892.
 100 shares N. P., preferred, February 18, 1892.
 100 shares L. & N., February 23, 1892.
 100 shares Rich. Term, March 4, 1892.
 100 shares N. P., preferred, March 28, 1892.
 100 shares Un. Pac., March 29, 1892.
 100 shares St. Paul, April 11, 1892.
 100 shares Tenn. C. & I., April 25, 1892.
 100 shares L. & N., June 20, 1892.
 100 shares L. & N., June 27, 1892.
 100 shares Rock Island, July 14, 1892.
 100 shares Un. Pac., August 12, 1892.
 100 shares Rock Island, September 1, 1892.
 100 shares L. & N., September 30, 1892.
 100 shares St. Paul, November 4, 1892.
 100 shares Un. Pac., November 4, 1892.
 100 shares Rock Island, November 28, 1892.
 100 shares St. Paul, January 31, 1893.
 100 shares Wab., preferred, February 9, 1893.

Total, 4,900 shares, purchased after September 15, 1890.

It will be seen that there were purchased on said account between March, 1889, and August, 1890—

| | |
|--|--------------|
| | Shares. |
| Stocks of various kinds amounting to..... | 3,500 |
| And that between September 29, 1890, and February 9, 1893, there were purchased | 4,900 |
| Total purchased | 8,400 |

Assuming the nominal value per share at \$100, the total nominal value of the stocks purchased was \$840,000.

It will be seen that said purchases were made from time to time as follows, namely:

In March, June, October, November, and December, 1889.

In March, June, September, and October, 1890.

In May, June, September, October, November, and December, 1891.

In January, February, March, April, June, July, August, September, and November, 1892.

And in January and February, 1893.

The Commercial National Bank failed March 25, 1893.

Said purchases were, therefore, practically continuous from the time said account was opened in March, 1889, to the failure of the bank in 1893.

The margins paid to Herzfeld & Co. to carry said account were as follows:

A draft was drawn on Nashville for \$1,500 as margin, which was paid and credited on said account March 21, 1889; and there was evidence tending to show that said draft was paid by the defendant.

Porterfield and the defendant made their joint demand note on August 15, 1890, for \$2,000, payable to the Commercial National Bank, which was approved

by the executive committee, and the proceeds of its discount were used as a margin on said account; *but the executive committee had no knowledge that said note was given for margins.*

Said account also showed the following sums of money remitted by Porterfield to Herzfeld & Co. on said accounts, which were the moneys of the Commercial National Bank, namely:

| | |
|------------------------|------------|
| October 10, 1890..... | \$2,000.00 |
| October 18, 1890..... | 1,000.00 |
| November 10, 1890..... | 2,000.00 |
| November 12, 1890..... | 1,000.00 |
| November 24, 1890..... | 3,000.00 |
| July 30, 1891..... | 1,000.00 |
| May 23, 1892..... | 1,000.00 |
| June 10, 1892..... | 2,000.00 |
| October 29, 1892..... | 1,152.30 |
| February 27, 1893..... | 1,500.00 |
| March 2, 1893..... | 2,000.00 |
| Total..... | 17,652.30 |

The Commercial National Bank failed March 25, 1893.

Porterfield testified that the defendant did not withdraw from the account; that defendant well knew all the time that the purchases were continued and the account was kept in force; that defendant and he (Porterfield) were jointly interested in said account; and that there was no suggestion of any withdrawal between them at any time.

Porterfield also testified that the defendant knew that he (Porterfield) was sending margins to Herzfeld & Co. to margin said account, and that the money which Porterfield was sending to margin the account was the money of the Commercial National Bank.

The defendant admitted that he was jointly interested in said account with Porterfield from May 24, 1889, until about September 15, 1890, when he says he withdrew from it, and had no further connection with it.

He does not claim to have notified Herzfeld & Co. of his withdrawal.

He does not claim to have had any settlement with Porterfield by which said joint account was closed.

The Government contended that from March, 1889, until the Commercial National Bank failed in March, 1893, the defendant knew that Porterfield and he were speculating on joint account in stocks through Herzfeld & Co.; and that Porterfield was misapplying the moneys of said bank to margin said account.

The Government contended that such conduct on the part of Porterfield was not an act of mere technical *ultra vires*, but a willful misuse of the bank's money to subserve the speculating purposes of the defendant and himself, who were the two chief officers of the bank.

And the Government also contended that, as the defendant had full knowledge of Porterfield's conduct, he could not have relied, and did not, in fact, rely upon any information which he claims to have obtained from Porterfield in regard to Dobbins & Dazey's account.

In further support of its contention that the defendant, in certifying the checks of Dobbins & Dazey, could not have relied, and did not in fact rely, upon any information which he claims to have obtained from Porterfield, the Government, as part of its case in chief, introduced evidence tending to show that on October 3, 1889, an account was opened, in the name of "Porterfield &

Spurr," with Latham, Alexander & Co., New York, bankers and brokers.

Said account showed purchases of stock as follows:

| | Shares. |
|---|---------|
| October 3, 1889..... | 100 |
| October 4, 1889..... | 100 |
| November 4, 1889..... | 200 |
| November 12, 1889..... | 200 |
| November 21, 1889..... | 100 |
| November 29, 1889..... | 100 |
| December 2, 1889..... | 100 |
| December 2, 1889..... | 200 |
| January 30, 1890..... | 100 |
| January 31, 1890..... | 100 |
| March 19, 1890..... | 100 |
| June 9, 1890..... | 100 |
| August 19, 1890..... | 100 |
| September 26, 1890..... | 100 |
| September 29, 1890..... | 100 |
| September 29, 1890 (North America)..... | 100 |
| August 19, 1892 (Reading)..... | 200 |
| Total..... | 2,100 |

Assuming the nominal value of each of said shares to be \$100, the total nominal value of all of said shares would be \$210,000.

The evidence also tended to show the following purchases of cotton on said account, namely:

| | Bales. |
|------------------------|--------|
| November 14, 1892..... | 500 |
| November 19, 1892..... | 500 |
| November 15, 1892..... | 500 |
| December 1, 1892..... | 1,000 |
| December 27, 1892..... | 500 |
| February 21, 1893..... | 1,000 |
| Total..... | 4,000 |

Assuming the value, per bale, of said cotton to be, say, \$50, the total value of said cotton would be \$200,000; and the aggregate value of said stock and cotton purchased on said account, between October 3, 1889, and February 21, 1893, would be \$410,000.

There was no controversy by the defendant concerning the purchase and sale of the 15 blocks of stock first above mentioned, and which were purchased, as shown above, between October 3, 1889, and September 29, 1890. He admitted that he was consulted about them by Porterfield, and authorized them to be made.

But he said that he was not consulted about the purchase of the above-mentioned 200 shares "Reading" stock, bought August 19, 1892, and 100 shares "North America" stock, bought September 29, 1890, and that he did not authorize their purchase.

The above-mentioned 500 bales of cotton, purchased November 14, 1892, were sold November 16, 1892, at a profit of \$595.02. Said profit was sent, by check, to Porterfield, and it was equally divided between him and the defendant.

One of the above-mentioned lots of 500 bales of cotton, purchased November 19, 1892, was sold November 25, 1892, at a profit of \$983.20; and the other lot of 500 bales, purchased November 19, 1892, was sold December 27, 1892, at a profit of \$624.43. Both of said profits were credited by Latham, Alexander & Co., to Porterfield & Spurr on said account.

The defendant admitted that he authorized those three purchases of cotton, and was fully informed of them by Porterfield.

The defendant, however, said that he was not consulted about the purchase of the above-mentioned 1,000 bales of cotton purchased December 1, 1892, the 500 bales purchased December 27, 1892, and the 1,000 bales purchased February 21, 1893. He said that he had no knowledge of them, and did not authorize them.

It so happens that losses were sustained amounting to over \$15,000 upon the particular 2,500 bales of cotton and the particular 300 shares of stock with reference to which the defendant says he was not consulted, and which he says he did not authorize.

Porterfield testified that the defendant knew all the time that the purchases were continued; that the account was kept in force; that he and defendant were jointly interested; and that there was no suggestion of withdrawal between them at any time.

There was evidence tending to show that Porterfield sent to Latham, Alexander & Co., on said account, out of the moneys and funds of the Commercial National Bank, the following sums, credited on said account, at the dates stated, namely:

| | |
|-------------------------|------------|
| November 14, 1890 | \$1,500.00 |
| December 8, 1892..... | 4,000.00 |
| February 7, 1893 | 1,000.00 |
| February 13, 1893 | 1,000.00 |
| February 14, 1893 | 1,500.00 |
| February 18, 1893 | 1,500.00 |
| March 1, 1893 | 2,600.00 |
| Total..... | 13,100.00 |

The Commercial National Bank failed March 25, 1893.

The defendant stated that he was not consulted about any of said remittances, that he had no knowledge of them, and that he did not authorize them.

Porterfield testified that the defendant knew of all the purchases of stocks and cotton, and knew that he (Porterfield) was remitting the moneys of the bank to New York upon them.

The Government contended that from October 3, 1889, down to the failure of the Commercial National Bank, the defendant knew that Porterfield was continuously speculating in stocks and cotton, through Latham, Alexander & Co., for the joint account of himself and the defendant; and from November 14, 1890, down to the failure of the bank, defendant knew that Porterfield was continuously sending large amounts of the bank's money to Latham, Alexander & Co., to margin said accounts.

The Government contended that Porterfield's conduct was not an act of mere technical *ultra vires*, but a willful misapplication of said moneys of the bank. And as the defendant was fully apprised of Porterfield's conduct, he could not have relied, and did not in fact rely, upon any information which he claims to have obtained from Porterfield in regard to Dobbins & Dazey's account.

The defendant claimed that in certifying the checks of Dobbins & Dazey he relied exclusively upon information which he had received from Porterfield. The Government claimed to have shown that the defendant was bound to know and did, in fact, know that Porterfield could not be relied upon for such information. The Government insisted that the defendant in applying to Porterfield for information, instead of applying to the teller and bookkeepers, was willfully seeking to obtain false information, and was willfully shutting his eyes to

true information, and therefore in certifying the checks of Dobbins & Dazey he acted *willfully and with bad intent to injure the bank.*

The evidence upon the trial of this case showed, or tended to show, that the defendant certified the checks of Dobbins & Dazey mentioned in the indictment as "good." That when he marked these checks "good" they were not "good," but, on the contrary, the account of Dobbins & Dazey was then largely overdrawn.

That the defendant was the president and highest officer of the bank; that he had a desk in the bank; that near him was a ledger known as the "Overdraft ledger," upon which was plainly marked the condition of the account of Dobbins & Dazey, and other creditors, as to whether they had a balance to their credit or were overdrawn, and one glance at which would have shown the defendant when he certified these checks that the account of Dobbins & Dazey was largely overdrawn and that these checks were not "good."

That the Commercial National Bank was receiving and crediting to the account of Dobbins & Dazey, *as cash*, the drafts of Dobbins & Dazey, *without bills of lading attached*; and there was evidence that the defendant and Porterfield, who was the cashier of the bank, were at this time, speculating in cotton through Dobbins & Dazey *without furnishing margins.*

That in 1886 and 1887 Porterfield, the cashier, *with the knowledge and consent of the defendant*, was using the money of the bank in speculations for the joint account of himself and the defendant, but *without the knowledge of the directors.*

That when certifying the checks of persons other than Dobbins & Dazey the defendant inquired of the teller or bookkeeper as to the state of the account but when it came to certifying the checks of Dobbins & Dazey, the smallest of which was larger than the largest check certified for anyone else, the defendant (taking his statement) departed from the usual custom of the bank, and in the trifling matter of certifying the check of Dobbins & Dazey for the small sum of \$40,000 did not deem it necessary to make inquiry of the teller or bookkeeper (but instead, went to Porterfield, whom, as the evidence in this case shows, he had reason to believe would not tell him the truth) as to the state of their account, although the account of Dobbins & Dazey was then overdrawn \$38,125.84, and the overdraft ledger, within a few feet of him, showed that fact.

Upon this and other facts as criminally reckless shown at the trial, the trial court instructed the jury as follows:

INSTRUCTIONS GIVEN BY THE TRIAL JUDGE TO THE JURY.

GENTLEMEN OF THE JURY: Your patience and fidelity in the attention which you have given to this case thus far afford ample grounds for confidence that you will pursue your duty to the end with the same sincere fidelity of purpose.

The conduct of their business by national banks is carefully hedged about by many provisions of law intended for the security of the public doing business with them and of their stockholders. The necessity for that security requires that those provisions should be faithfully enforced. The courts of the United States are the proper tribunals for

that purpose. We are called upon in the present case to discharge that duty upon indictments charging grave violations of this law. Great care must be taken that punishment shall not fall upon an innocent person, but it is equally our duty, if the charges are proven beyond a reasonable doubt, to proceed to the conclusion which legal justice requires. The usage and practice of these courts is founded upon the legal proposition that it is the province of the court to decide all questions of law, and that it is the province of the jury to decide the questions of fact. Whatever may be the usage and practice in the State courts of Tennessee, the law of the United States, by which the court and jury are bound in the disposition of this case, is to the effect which I have just stated. The sum of the matter is, then, that the jury are bound by the instructions of the court as to matters of law. The suggestions of the court as to evidence, touching matters of fact, are for the assistance of the jury, but it is the right and duty of the jury to finally determine all questions of fact without being trammelled by the suggestions of the court. It is usual in these courts for the judge to make such comments upon the evidence as the court may think expedient for the purpose of aiding the jury in reaching a disposition of the case upon its substantial issues, but this is the limit of the duty of the court upon such matters, and the jury will receive and act upon such suggestions so far as they may find them useful to them in their inquiry after the truth.

The specific charges upon which the defendant is now being tried are the certification of the following checks:

Check of Dobbins & Dazey on the Commercial National Bank to Fourth National Bank, dated December 9, 1892, for \$15,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated December 17, 1892, for \$31,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated January 3, 1893, for \$40,000.

Check of Dobbins & Dazey on Commercial National Bank to Fourth National Bank, dated February 13, 1893, for \$9,641.95.

Each of the offenses thus charged constitutes a specific violation of the law. It is competent for the jury to find the defendant guilty of all, or not guilty of any, or guilty of some and not guilty of others; or to find the defendant guilty or not guilty of some of them, being unable to agree as to others. It is upon the false certification of the four above-mentioned checks that the issues of this case are joined. The evidence of the former application of the funds of the Commercial National Bank by Mr. Porterfield in his own speculations and those of himself and Spurr, with the knowledge of Spurr, has been admitted for a subsidiary purpose which will be presently explained. Reference is here made to the evidence of the transactions with DeNeufville & Co., Herzfeld & Co., Kohn, Popper & Co., and Latham, Alexander & Co., in New York.

In all trials upon accusation of crime the defendant is presumed to be innocent until that presumption is overborne by testimony proving him to be guilty. The defendant is entitled to such a presumption in this case. The fact that there have been former trials of this case does not affect your duty; you are responsible for your verdict, and you are not here to register the opinion of others nor to follow in their wake. Your conduct should be wholly unaffected by the result of such former trials.

The Government is bound in order to maintain any of the counts in these indictments to prove:

First, that the defendant certified the check.

Second, that the drawers of the check had not sufficient funds in the bank to meet such check.

Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and secondly, that the account of the drawers was overdrawn when these certifications took place; but third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the court charges you that it is not necessary for the Government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey's account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an

examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey's account, or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check and that there was no warrant for marking the check "good," that was sufficient.

I am requested by counsel for the Government to instruct you, and you are charged that, if you are satisfied by the proof beyond a reasonable doubt that the account of Dobbins & Dazey with the Commercial National Bank was not a special but a general depositor's account, the deposits as they came into the bank were *prima facie* applicable to the liquidation of overdrafts which appeared on the account at the commencement of business, and were thus absorbed, and if the amount of deposits made during the day were not equal to the overdrafts with which the day commenced, you will consider that, as a matter of fact, there were no moneys on deposit on such day.

These checks before their certification were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it. But the presumption of knowledge is not an absolute one and the defendant may show, if he can,

that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith would not render him guilty.

Evidence has been offered to prove Dobbins & Dazey to have been heavily overdrawn for some time when some of these checks were certified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employees of the bank; and further, that it was not customary for checks to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless he testifies that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing their account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question. Not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.

In determining these questions you are to look to all the evidence bearing upon his knowledge and give all, its just effect. You are not restricted to the direct evidence of the fact, the moral probabilities flowing from conceded facts, or which are proven to your satisfaction should also be considered, and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel for the defendant have submitted a series of requests for instructions, some of which I allow, others I give with modifications, which will be stated as I proceed, and others are declined, either because in the opinion of the court they do not correctly state the rule or are liable to mislead. Such of them as are granted, I will now proceed to read, and they will be regarded as part of the instructions of the court. They are to be taken, however, in connection with the propositions stated in these instructions by the court upon its own motion, and not as being in conflict with them.

I charge as requested: (1) "The statutes of the United States, under which the Commercial National Bank of Nashville was organized and conducted, do not prescribe or define the duties of the president and the cashier in respect to the books, accounts and details of the business of the bank; but they confer upon and vest in the board of directors the power to prescribe and define such duties and to adopt by-laws for that purpose."

Again: (2) "Certain by-laws of this bank have been put in evidence before you relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former relating to the duties and responsibilities of the cashier, means that

he, the cashier, shall be responsible generally for all the moneys, funds, and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds, and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to be held responsible only for such sums of money and property of the bank as may be entrusted to his care, or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be thus placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank as may be placed in his hands or as may come into his hands as president, and that both these officers are each to faithfully and honestly discharge their respective duties." To this I add: But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.

(3) "If you believe from the proof that at the organization of the bank, the cashier was a man of experience in the details of the banking business, and

that the president was without experience or special knowledge of such matters; and if you further find that in view of these facts, it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those officers, in connection with the other proof in the case, bearing on the question whether the defendant had knowledge of the state of the account of Dobbins & Dazey at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know of the state of the account at the time he certified said checks."

To which I add: But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

Then this request: (5) "If you find from the proof that the account of Dobbins & Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified, was sufficient or

more than sufficient to cover the amount of said checks," besides the overdraft already existing, "then he is not guilty and you should acquit him," unless such ignorance of the overdraft was willful as elsewhere explained in the court's instructions. In this connection you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins & Dazey, the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins & Dazey to respond to the checks.

(7) If you find "that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified"—I add: In addition to the existing overdraft—"he would not be guilty under the indictment and you should acquit him."

(8) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith"—these words mean substantially the same thing,— "shut his eyes to the fact and purposely refrained from inquiry or investigation for the purpose of avoiding knowledge."

(10) "If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of

Dobbins & Dazey, and that he did so in good faith believing those statements and representations to be true"—and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, "his certifications, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be and believed by the defendant to be, a man of honesty and" right conduct as respects the affairs of the bank, "the defendant would have the right to rely upon his statements in regard to that account."

(11) "The fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew that fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier "had been using the funds or credits of the bank" instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank, and was acting" unlawfully in respect to its affairs.

(12) "The defendant in this case is not indicted, nor being tried for buying or selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters,"—I interpolate, on his individual account without involving the bank. "You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such

transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find beyond a reasonable doubt that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether the defendant knew, or was charged with knowing because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks."

(15) "The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt."

(16) "The burden of proof rests upon the Government as to all the material facts and circumstances of the case, and if you have a reasonable doubt as to any fact or circumstance relied on by the Government," I should say, any material fact or circumstance relied on by the Government, "either as direct or inferential proof against him, you should resolve that doubt in his favor and dismiss such fact or circumstance from further consideration. You must be satisfied from the proof beyond a reasonable doubt, of every fact essential to the guilt of the defendant of the specific charges in this indictment before you will be warranted in convicting him."

I return now to the instructions given upon the court's own motion. The defendant, by a modern

statute, is rendered competent to testify in his own behalf. His testimony is subject to be estimated with reference to the interest which he has in the result, and the jury will give it such credit as they think it is justly entitled to in view of its quality, the witness's burden of interest and the bearing of the other evidence in the case upon it.

The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on either in the interest of the bank or its officers as individuals, or any other persons is unlawful. Their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged with the knowledge of Spurr in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them

has been admitted, and is to be applied by the jury solely upon the question of the knowledge and intent of the respondent, when he made the false certifications of the checks mentioned in the indictment.

Mr. Porterfield has been called to the stand as a witness. The court has been requested to instruct you in regard to the proper weight to be given to his testimony. He is a competent witness as a matter of law. There are, besides, these certain rules which have been thought to be useful in sifting the testimony of accomplices and fixing its weight. They are not of binding force as rules of law but are to assist the judgment in forming prudent conclusions, for in the end the jury must form their judgment of such testimony upon all the circumstances and facts proven before them, and the impression which all collectively produce upon their minds.

Some of the rules just referred to are, that such testimony, that is, the testimony of an accomplice, is to be taken and regarded with caution, and that it is not safe to act upon it unless it be confirmed in some material part of the witness's testimony. If it be thus confirmed, then the jury may act upon it throughout if, upon the whole, they find it worthy of credit. The situation of the witness at the time of testifying is to be regarded; whether before his own sentence, and under expectation of gain from giving the testimony, or whether he has nothing to gain from such testimony or any other circumstances which the jury may see is properly to be regarded in estimating its weight.

Two witnesses have been called to testify that Mr. Porterfield on certain occasions made statements inconsistent with his present testimony. In considering that testimony you will naturally consider, not only what was the actual admission made,

but also the circumstances and for what motive the admission or statement was made. Has the admission been correctly related? Did it go beyond a statement that he was the principal and had been the leader in wrongdoing, and that he had carried Spurr on the outside of the transactions as respects the entries in the books of the bank, or did he go further and state that Spurr had nothing whatever to do with any of the wrong things which had been done, And in considering the accuracy of the relations made by one of the witnesses who has testified you may properly consider any such zeal or interest in the obtaining of it as the testimony in your view justly warrants you in believing. If his statements then made are correctly reported, then the motive of Porterfield in making them may properly be inquired into. Did he make them, knowing that his own doom was sealed; because he was willing to shield Spurr, or did he make the statements under pressure of his conscience and because they were true? But whatever Mr. Porterfield may have said on these occasions is not to be taken as proof of the fact, but only for the purpose of affecting Porterfield's credit, and for every other purpose such statements as detailed here are mere hearsay. This distinction it is proper for the jury to understand and apply. The evidence as to what Porterfield said on the occasions to which those witnesses refer is not to be received as evidence of the facts which he may have then stated, but is only receivable and to be considered by you as evidence tending to touch the question of credit which you should give to his testimony. Whatever credit his testimony delivered here may be entitled to, the question remains for you to settle upon all the evidence whether the defendant Spurr in certifying these checks acted in good faith, and

without any intent to do that which the law forbids and which he must be presumed to know was unlawful, namely the certifying of the check as good when the maker of it has no funds in the bank to meet it. If he acted in good faith, believing that the makers of the checks had funds in the bank to pay them he should be acquitted. If he certified the checks, either knowing that the funds to respond were not in the bank and that the making of the check was unwarranted, or having in his conscience good reason for believing that such was the fact, purposely refrained from inquiry, then the charge against him is made out. The facts which are charged as constituting his guilt must be proven beyond a reasonable doubt. That is to say, so proven as to persuade a clear and abiding conviction of the defendant's guilt, such conviction as is not shaken by any reasonable doubt, grounded upon the testimony. If you are so convinced of his guilt he should be convicted, otherwise not.

I have thus presented to you what seems to the court the salient features of the case, and I now leave it to you to decide according to your convictions of the truth under the solemnity of your oaths, and that inflexible sense of duty which every right-minded juror must experience in determining an issue of such grave import to the public on the one hand and the private citizen on the other.

The jurors have in mind the dates and amounts of these several checks? Would they desire a brief abstract of them?

(By a JUROR.) And the state of the accounts at the time those checks were certified; we would like to have an abstract of that.

(By the COURT.) You can retire, gentlemen, and we will see to the sending to you, in the care of the bailiff, of these details.

ASSIGNMENTS OF ERROR.

There are twenty assignments of error. The first assignment is that there is error in a part of the following instruction :

The checks, before their certification, were not obligations of the Commercial National Bank ; they were made such by the act of the defendant in certifying them to be good ; by that act this bank was estopped to deny his obligation to the other banks which held them. (*It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself if he did not already know it. But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth.*) And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.

That part of the instruction above quoted which is inclosed in parentheses and italicized is the paragraph which constitutes the defendant's first assignment of error.

The first proposition assigned as error is that : "It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn."

It certainly can not be said that this is not a correct proposition of law.

Here is a national bank existing under laws of the United States that permit its organization. Its officers have in their custody large amounts of money belonging to depositors, placed there by them through their feeling of confidence that the president and all of the officers of the bank are honest and will do their duty. Can it be said, that under the law, the president of the bank can certify checks—mark them as “good,” when they are not good, and when he *knows* that *he does not know* whether they are “good” or not, and then escape the penalty for so doing by merely saying “I didn’t know it?” If such is the law and the court should so hold, an officer of a national bank can at all times protect himself from criminal liability by simply abstaining from inquiry before certifying checks.

The certification of the checks in this case purported on its face to be the personal act of the defendant as president of the bank, and not an act based upon information from others.

It was an *affirmative* act. He said when he marked the checks good that they were good within the meaning of the law and that Dobbins & Dazey, at the time he certified them, had the money on deposit with which to pay them. If he did not know that this was true, he knew that he did not know it, and under the law, it was his duty to know or to inform himself before he affirmatively said that he knew by certifying the checks.

The second proposition assigned as error is: “From the existence of such a duty you may draw an inference *of fact* that he did so inform himself, if he did not already know it.”

It was the duty of the defendant, if he did not know as to the state of this account, to inform himself. If it was his duty to inform himself, the jury had the right to infer, not as a matter of law, but as a matter *of fact*, that he did his duty, that he did so inform himself and that he did know that the account was overdrawn when he certified the checks.

It is a principle not disputed that the law presumes every man in his private and official character does his duty until the contrary is proved. (1st Greenleaf on Evidence, section 40, Redfield's edition; Lawson's Presumption Evidence, p. 61.)

The court did not say to the jury that this inference was a presumption of law. Upon the contrary, the court said in express terms to the jury that it might draw an inference *of fact* that he did so inform himself, and the court further qualified that part of the instruction by adding, "but the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth."

In the opinion rendered by Justice Swan in this case in the circuit court of appeals (reported 87 Fed. Rep., 714), commenting upon the part of the instruction last quoted, he uses this language: "This certainly deprived that presumption of any controlling influence in the minds of the jury against the defendant and emphasizes its rebuttable nature."

Presumptions *of fact* are, at best, mere arguments; but they may be allowed to prove facts even in criminal cases. (Lawson's Presumption Evidence, p. 556.)

The court did not tell the jury that the existence of such duty would raise a presumption of knowledge *which would authorize conviction*, unless defendant could rebut that presumption.

There were other facts to be proven by the Government besides the mere fact of knowledge; and if the court had said that defendant might be convicted if he merely failed to rebut the presumption of *knowledge* it would have been error.

But as knowledge was one of the facts to be proven it could be proven by inference or presumption like any other fact, and if the defendant failed to remove the inference or presumption arising from the existence of a legal duty, the jury were fully warranted in inferring that he did his duty and, therefore, that he acquired knowledge of the state of the account.

The court merely told the jury that they might infer the single fact of knowledge. It did not tell them that it might infer the fact of guilt. The fact of guilt is a fact of which knowledge is only one of the several facts.

The court did not say that the existence of the duty *creates* presumption. The court merely said that the jury was at liberty to draw an inference or argument *of fact* to that effect, if they saw proper to do so.

In the first part of the instruction of which the paragraph complained of is a part, the court told the jury that these checks, before they were certified by the defendant, were not obligations of his bank, and that they only became so by reason of his certification, and after instructing the jury upon the question of the defendant's duty, and the right of the jury to draw an inference of

fact, that he had done his duty, the court concluded the instruction by telling the jury that if the defendant, in making these certifications, acted in good faith, believing that the account of Dobbins & Dazey justified it, he was not guilty of the offense charged, and by expressly telling them that mere negligence or carelessness unaccompanied by bad faith would not render him guilty. In other words, the court said to the jury in that instruction that in order to constitute the crime there must have been "bad faith" or an intent to do wrong, and the jury, in finding the defendant guilty under that instruction, evidently believed that he had acted willfully, in bad faith, and with intent to do wrong.

Again, this case was not given to the jury to find the fact of knowledge solely upon the inference of fact that the defendant did his duty. There was other evidence in the case, both direct and circumstantial, tending to show, as a matter of fact, that the defendant did know when he certified these checks that the account of Dobbins & Dazey was overdrawn. For example: It was proven on the trial that the defendant was a very intelligent man; that he had a desk in the rear of the room where the banking business was carried on; that he was frequently among the employees of the bank; that he had before that time inquired of the teller and book-keeper of the state of the accounts of other persons for whom he had certified checks; that there was an "overdraft ledger," of the existence of which the defendant knew, which showed each day the state of the account of every depositor of the bank, and all these facts tend to show that when the defendant certified checks drawn

by Dobbins & Dazey for large and unusual amounts as good, that he knew that the account of Dobbins & Dazey was then overdrawn.

In addition to this, the jury were explicitly instructed that the Government must establish the defendant's knowledge of the state of Dobbins & Dazey's account beyond a reasonable doubt in order to maintain any of the counts in the indictment.

SECOND ASSIGNMENT.

The second assignment is that there is error in the modification of defendant's third request for special instruction.

The instruction as given by the court is as follows :

If you believe from the proof that at the organization of this bank the cashier was a man of experience in the details of the banking business, and that the president was without experience or special knowledge in such matters, and if you further find that in view of these facts it was then understood and agreed by the board of directors that the cashier was to have immediate charge and supervision of the details, books, accounts, and internal affairs of the bank, and that the president was to give his attention to working up custom and patronage and looking after such special matters as should be referred to him for his attention, it will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers in connection with the other proof in the case bearing on the question whether the defendant had knowledge of the state of accounts of Dobbins & Dazey at the time when he certified the checks of that firm which

are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant did actually know the state of that account at the time he certified said check. (*But these are part only of the facts which you should consider upon the question of the defendant's knowledge; and further, this instruction is to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.*)

The error complained is that the court added to the instruction the part contained in the parentheses and italicised.

The proposition contained in the addition is that the facts set forth in the special instruction are part only of the facts which you (the jury) should consider upon the question of the defendant's knowledge.

This proposition is too well settled to be assigned as error, and it was entirely proper for the court to instruct the jury that the facts set forth in the first part of the instruction were not the *only* facts that they were to consider.

The next proposition contained in the addition made by the court to this instruction is that the instruction requested was to be taken with the other instruction that actual knowledge is not necessary if the defendant purposely abstained from inquiry.

The instruction as requested was that the jury should keep in mind certain specified facts together with by-laws and give them such weight as the jury might think they are justly entitled to "on the question whether or not the defendant *did actually* know."

The instruction as requested was erroneous. It would have been entirely proper to have refused it as a whole. The question as to whether the defendant *actually* knew was wholly immaterial.

If the defendant purposely abstained from inquiry so that *actual* knowledge could not be reputed to him, he was just as guilty as if he had *actual* knowledge. If the defendant purposely abstained from inquiring from the bookkeepers and teller, whom he knew could furnish him accurate information, and went through the farce of inquiring of Porterfield, who, he had every reason to know, would give him false information, his want of *actual* knowledge would furnish no defense. The instruction, as requested, might have led the jury to suppose that *actual* knowledge was the true test of the defendant's guilt. The court was right to tell the jury that the instruction requested was to be taken with the other instruction that *actual* knowledge is not necessary, *if the defendant purposely abstained from inquiry.*

THIRD ASSIGNMENT.

The third assignment is that there is error "in the refusal by the court of the defendant's fourth request for special instructions," which was as follows:

If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier and not to the president, and that the cashier was directed by the executive committee of the bank to look specially after the account of Dobbins & Dazey, and that it was not at any time referred to or placed in the

hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books can not be imputed to the defendant simply because he was president or director.

This instruction was erroneous. Though the management of the details and accounts of the bank may have been intrusted specially to the cashier and not to the president; and though the cashier may have been directed by the executive committee of the bank to look specially after the account of Dobbins & Dazey; and though said account may not at any time have been referred to or placed in the hands or under the charge of defendant; and though defendant's attention may never have been called to it by the executive committee; and though defendant may have been ordinarily assigned to other duties; yet when he *assumed to certify to the affirmative fact* that the check was "good," he necessarily had his "attention" called to that account; and he necessarily assumed the duty to inform himself of the state of the account. And from the existence of such an assumed duty the jury might well draw an inference of fact that he did so inform himself.

That fact that the defendant had a desk in the directors' room in the rear end of the banking house; the fact that he had access to the books of the bank and was frequently among the clerks and bookkeepers in the front of the banking house where the books were kept; the fact that the overdrafts of Dobbins & Dazey appeared

upon the ledgers in conspicuous red ink; the fact that defendant was making inquiries of the clerks and bookkeepers concerning various matters and accounts from time to time; the fact that he was a very intelligent man, and that every employee in the bank from the cashier down to the porter knew that Dobbins & Dazey's account was largely and continuously overdrawn; the fact that he knew that in the ordinary course of business the teller or bookkeeper was the person to go to when a bank officer was called upon to certify a check; the fact that instead of going to the teller or bookkeeper he went to Porterfield, with whom he had been speculating in stocks and cotton for many years and using the bank's money; the fact that he and Porterfield, at the time said checks were certified, were each speculating in cotton futures through Dobbins & Dazey without furnishing any margins, were facts, all of which should have been considered in determining whether the defendant had knowledge of the condition of Dobbins & Dazey's account; and the defendant had no right to so frame the instruction as to exclude all of those facts, and make the question of knowledge depend upon what was the proper inference to be drawn "from *the mere fact* that the account appeared on the books of the bank to be overdrawn."

Again, in considering the evidence in this case the jury had the right to consider all the facts and circumstances shown in evidence. They had a right to take into consideration the relation of the defendant to the bank as its president; they had the right to consider the nature of his duties; they had a right to consider all

that he did and said, so far as it tended to throw any light upon the question as to what the defendant's knowledge actually was.

This instruction is so framed that it takes away from the jury the right to take into consideration the relation of the defendant to the bank or to consider what he did and said, but instead, the effect of the instruction was to find the question as to what was the proper inference to be drawn from the *mere fact* that the account appeared on the books of the bank to be overdrawn.

The jury had the right to consider the fact that there was an overdraft appearing upon the books of the bank as affording some ground of presumption that the president had knowledge of it.

This instruction took away from the jury that right and confined the question as to what was the proper inference to be drawn from the *mere fact* that the account of Dobbins & Dazey appeared on the books of the bank to be overdrawn, and would have misled the jury into believing that they had no right to take into consideration *all* the facts and circumstances shown at the trial.

The proposition contained in this instruction to the effect that "knowledge of the contents of the books can not be *imputed* to the defendant *simply because he was president or director*" might have been correct, if it had stood alone, and such a proposition might possibly have been given by the court to the jury. But as that proposition was coupled in the same instruction with another proposition which was clearly erroneous, the court was justified in refusing to give the instruction as an entirety. An instruction, if bad in part, is bad altogether.

FOURTH ASSIGNMENT.

The fourth assignment is that there is error "in the refusal by the court of defendant's sixth request for special instruction," which was as follows:

It is incumbent on the Government to prove to your satisfaction, beyond a reasonable doubt, that at the time the defendant certified the check mentioned in the indictment he *actually* knew that Dobbins & Dazey did not have on deposit in the bank funds and credits sufficient in amount to cover the check certified by him. It is not sufficient for the Government to show that it was the defendant's duty to know this fact, and that he *neglected it*; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was *careless or negligent* or overconfident in the correct management of the accounts by the cashier; nor that he had the opportunity to know the facts and *failed to avail himself of it*; but it must appear by the proof, beyond a reasonable doubt, that he did *actually* know, at the time he certified the checks, that sufficient funds were not on deposit to meet the checks, and that he certified them willfully and with such knowledge.

The court, in refusing the instruction, indorsed upon it that it was "declined except as given in other instructions."

The first proposition in this instruction is that it is incumbent on the Government to prove the facts in issue to the satisfaction of the jury "*beyond a reasonable doubt.*"

That proposition was given by the court to the jury in

the fifteenth special instruction asked for by the defendant, and granted, as follows:

The law presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt.

It would not be possible to instruct the jury in plainer language that the Government must make out a case to the satisfaction of the jury "beyond a reasonable doubt."

It was not necessary to repeat this instruction.

The second proposition is one which is twice expressed in the instruction.

It is first expressed at the commencement of the instruction, as follows:

It is incumbent on the Government to prove to your satisfaction beyond a reasonable doubt that at the time defendant certified the checks mentioned in the indictment he *actually* knew that Dobbins & Dazey did not have on deposit in the bank funds and credits sufficient in amount to cover the checks certified by him.

The same proposition is again expressed at the close of the instruction, as follows:

But it must appear by the proof, beyond a reasonable doubt, that he did *actually* know, at the time he certified the checks, that sufficient funds were not on deposit to meet the checks, and that he certified them willfully and with such knowledge.

The proposition, whether as expressed at the commencement or at the close of the instruction, is erroneous, and should not have been given for the reason that it, in fact,

instructs the jury that it is necessary for the Government to prove *actual* knowledge.

Suppose the defendant did not have *actual* knowledge. Yet, if it was proven beyond a reasonable doubt that defendant "willfully, designedly, and in bad faith shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge," he was just as guilty as though he had *actual* knowledge of the fact.

The defendant, in offering to the court the eighth special instruction, in effect conceded that *actual* knowledge is not required. In that instruction the jury are told in substance that the Government need not prove *actual* knowledge, provided it could prove that the defendant willfully shut his eyes for the purpose of avoiding knowledge.

The court gave the eighth special instruction asked by defendant, with the addition by the court of the words in parentheses, as follows:

(8) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did *actually* know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, *unless* you are convinced by the proof beyond a reasonable doubt that he willfully, designedly and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The entire instruction except the words in parentheses, is in the language of defendant's counsel.

The court gave to the jury this instruction asked for by defendant which stated the law correctly, and, therefore, declined to give the sixth special instruction, which contained the erroneous proposition that the Government was bound to prove *actual* knowledge.

The third proposition expressed in the instruction is that—

It is not sufficient for the Government to show that it was the defendant's duty to know this fact (*i. e.*, the fact that Dobbins & Dazey did not have on deposit sufficient funds, etc.), and that he *neglected* it; nor that he could have known or ascertained the fact by inquiry of the clerks or by examination of the books; nor that he was *careless or negligent* or overconfident in the correct management of the account by the cashier; nor that he had the opportunity to know the fact and failed to avail himself of it.

The only object of this proposition in the instruction was to instruct the jury that mere negligence or carelessness would not render the defendant guilty. The court gave the jury such instruction in the general charge as follows:

And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. *Mere negligence or carelessness unaccompanied by bad faith would not render him guilty.*

The court, in the eighth special instruction above quoted, told the jury that the proof must satisfy their minds clearly and beyond a reasonable doubt, either that

the defendant actually knew or that he willfully, designedly and in bad faith shut his eyes to the fact for the purpose of avoiding knowledge. It was, therefore, wholly unnecessary for the court to say that it was not sufficient for the Government to prove "mere negligence or carelessness;" because mere negligence or carelessness is neither actual knowledge nor the willful avoidance of knowledge.

The third proposition might, therefore, have been rejected as mere surplusage; but as shown above it was given in the general charge of the court to the jury.

FIFTH ASSIGNMENT.

The fifth assignment is that there is error "in the modification of defendant's second request for special instructions by the addition of the words inclosed in parentheses at the end thereof," said special instruction, as so modified and given, being as follows:

2. Certain by-laws of this bank have been put in evidence before you, relating to the duties and responsibilities of the cashier and president, and these by-laws, being numbers 8 and 9, having been read and commented on in the argument, I instruct you that the former, relating to the duties and responsibilities of the cashier, means that he, the cashier, shall be responsible generally for all the moneys, funds and valuables of the bank, and requires him to faithfully apply and account for all its moneys, funds and valuables, and that he is primarily charged with the faithful keeping and accounting for the same. The latter, relating to the duties and responsibilities of the president, means that he is to

be held responsible only for such sums of money and property of the bank as may be entrusted to his care or placed in his hands by the board of directors, or by the cashier, or which may otherwise come into his hands as president, and that he is to be responsible only for such sums of money and property as may be placed or come into his hands, and is to faithfully and honestly apply and account for the same and otherwise faithfully discharge his duties as president. These two by-laws, taken together, mean and imply that the cashier is primarily responsible for all the funds, property, and valuables of the bank, and that the president is responsible only for such funds, property, and valuables of the bank as may be placed in his hands as president, and that both of these officers are each to faithfully and honestly discharge their respective duties. (But I further charge you that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn.)

The modification added by the court to the instruction was eminently proper.

In fact, the instruction as an entirety was irrelevant, misleading, and might have been properly declined by the court as a whole.

As the Government did not pretend that any of the moneys, funds, property, or valuables of the bank, connected with the account of Dobbins & Dazey, had ever been placed in the defendant's hands as president, it

was wholly irrelevant to go into a lecture before the jury as to what were the responsibilities of the president of a national bank for moneys, funds, property, or valuables of the bank placed in his hands; and yet the instruction as presented to the court contained practically nothing except a discussion as to what were the relative duties and responsibilities of the cashier and president, respectively, with reference *to moneys, funds, property, and valuables of the bank*. The instruction, as presented to the court, was careful to state, at least three times, that the president was to be held responsible *only for such sums of money, funds, property, and valuables of the bank* as may be placed in his hands as president; and the jury might very properly have inferred, from the language of the instruction, that as none of the moneys, funds, property, or valuables of the bank had been placed in the defendant's hands in connection with the Dobbins & Dazey account, he was not responsible for the certification of their checks, although he may have actually known that they had no money on deposit to meet the checks.

The jury, in discussing the matter among themselves, might well have argued it thus: "There is no proof that any of the moneys, funds, property, or valuables of the bank connected with the account of Dobbins & Dazey were ever placed in the defendant's hands as president, and the court has instructed us that he 'is responsible *only for such funds, property, and valuables of the bank* as may be placed in his hands as president;' and therefore, we are bound to find the defendant not guilty."

The court, however, instead of refusing the instruction, as it might well have done, saw proper to give it to the jury; but in doing so, added at the foot of it the language inclosed in parentheses. The instruction, as presented to the court, conceded that the defendant was bound "to faithfully and honestly discharge his duties as president;" and the court in effect added to the instruction that "the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding those by-laws, to certify checks, and when the president assumed to certify these checks as good the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."

The defendant in certifying the checks certified to an affirmative fact. He had full knowledge that by so doing he would make the bank liable. It was his duty to the bank, to its stockholders and to its creditors, if he did not already know, to inform himself in regard to the important fact of the condition of the account before he assumed to certify to it over his own signature.

To hold as contended for by the defendant in this case, would be to hold that the duties of the president of a national bank do not require him to be informed of the condition of the account on which checks are drawn. Such a doctrine would be a dangerous one. Under it officers of national banks could abstain from inquiry before certifying checks, and they could protect themselves by the pretense of applying for information to some person whom they knew, or had every reason to believe, would give them false information.

In this instruction the court does not tell the jury that the faithful and honest discharge of his duty required him to be *correctly* informed of the condition of the account. He may have looked at the ledger himself and made an honest mistake. He may have inquired of the teller or bookkeeper and they may have been honestly mistaken in their representation to him, or they may have falsely, fraudulently misstated the condition of the account to him. In either case the defendant would have been *informed* of the condition of the account.

The court did not tell the jury, and the jury could not have understood the court to mean, that the defendant would be criminally liable because he acted upon false information, provided he did not have some reason to believe the information was, in fact, false.

All that the court intended and all that the jury understood that the court intended by the addition to this instruction was that notwithstanding the *by-laws* of the bank, taken by themselves, may hold a president responsible *only for such sums of money, funds, property, and valuables of the bank as may be placed in his hands as president*; yet the *general law* imposed the duty upon him before he certified that a check was good, to be informed in good faith (whether his information was correct or not) as to the condition of the account.

SIXTH ASSIGNMENT.

The sixth assignment is that there is error in the following language of the charge of the court to the jury:

The Government is bound, in order to maintain any of the counts in these indictments, to prove:

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

The construction which defendant's counsel seek to put upon the language of the charge quoted in this assignment is, first, that the court did not explain the last paragraph of the charge as promised, and second, that the court, in giving this part of the charge, told the jury, in effect, that the establishment of three facts *would authorize conviction*.

The court did not say, and did not even intimate to the jury, nor could the jury have understood, that the establishment of three facts *would authorize conviction*.

The court did say that the Government was bound to prove these three facts, but it did not intimate *that they were the only facts* that the Government would have to prove in order to authorize a conviction.

The language of the charge quoted in this assignment did not stand alone. The court did explain in the general charge to the jury what was meant by the last paragraph of this quotation, and expressly told the jury that there were other facts to be proven before a conviction would be authorized. Upon this question the court told the jury that—

The Government is bound in order to maintain any of the counts in these indictments to prove :

First. That the defendant certified the check.

Second. That the drawers of the check had not sufficient funds in the bank to meet such check.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks, and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.

The court also told the jury that—

If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The court also said to the jury:

And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty.

The court also said to the jury :

If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, made in honest reliance upon them, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account.

The court also said to the jury :

If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified were sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdrafts was willful, as elsewhere explained in the court's instructions.

The court also said to the jury :

The fact that the cashier had bought and sold stocks and bonds on cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the

defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier had been using the funds or credits of the bank instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that the cashier was unfaithful to the bank and was acting unlawfully in respect to its affairs.

The court also said to the jury :

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.

It will be seen from these extracts that the court did explain the last paragraph complained of in this assignment and that it did not tell the jury that the establishment by the Government of these three facts *would* authorize conviction.

SEVENTH ASSIGNMENT.

The seventh assignment is that there is error "in the modification of defendant's fifth request for special instructions, by the interlineation of the words inclosed in parentheses, namely, 'Besides the overdraft then existing,' " which special instruction, as so modified, was as follows :

If you will find from the proof that the account of Dobbins & Dazey upon the books of the bank

was overdrawn continuously during the period covered by the checks certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks (besides the overdraft then existing), then he is not guilty, and you should acquit him, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions.

The modification inserted by the court in the instruction was exactly right.

The action of a *nisi prius* court in dealing with carefully prepared and ingeniously worded requests for special instructions can not be properly judged of by an appellate tribunal without taking into full consideration all of the facts and circumstances of the trial as they appeared to the *nisi prius* court.

A request for a special instruction may present a proposition of law, which viewed abstractly, is entirely correct; and yet it may be wholly irrelevant to the facts of the particular case, and if it should be incorporated in the charge, its effect would be to confuse and mislead the jury.

So, in a case like this, where the facts are numerous and complicated, a request for a special instruction may ingeniously single out a few isolated facts, and present a hypothesis based upon them, which would be entirely correct if those facts stood alone; and yet, by giving undue prominence to the facts thus ingeniously selected,

and at the same time ignoring all of the other facts in the case, a request submitting such an hypothesis to the jury would be positively misleading.

As an appellate tribunal can never see a case exactly as it was tried in the *nisi prius* court, it must necessarily place great reliance upon the good sense and judgment of that court.

While it is impossible for this court to see this case exactly as it was tried below, there is enough in the record to show that one of the facts which was greatly relied upon by the defendant in that court was the fact that on the day that "each of the checks mentioned in the indictment, except that of December 17, 1892, was certified by the defendant, there was deposited in the bank by Dobbins & Dazey, in New York exchange or drafts, a sum more than sufficient to cover the check certified on that day, although not sufficient to cover both the check and the overdraft then existing on the books of the bank, as shown by the individual ledger on the morning of that day."

It will be noticed that the instruction as presented to the court ingeniously excluded from the hypothesis which it contained, all reference to the rule of law which requires that the exchange deposited by Dobbins & Dazey on the days when the respective checks were certified, be first appropriated to the absorption of the overdrafts which appeared on the account at the commencement of business on those days. And if the court had given the instruction just as it was presented, and without reminding the jury of the rule of law which requires that the exchange deposited be first appropriated

to the absorption of the existing overdrafts, there would have been imminent danger of the jury construing the instruction as though its entire substance was contained in the concluding part of it, wherein it was said that if the defendant "certified the several checks, mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions."

It is true, that in the first clause of the instruction the hypothesis supposes "that the defendant was in fact ignorant" of the existing overdraft; but the court below could not shut its eyes to the fact that there was a very great deal of evidence to show that the defendant was not ignorant of the overdraft; and it would have been a great oversight if the court had given the hypothetical instruction without reminding the jury of the rule of law which requires that the exchange deposited be first appropriated to the absorption of the overdraft.

If the defendant's real object had been to get an instruction as to the legal effect of the fact that he was ignorant of the overdrafts, he should have confined the instruction to the first clause of it, which is as follows:

If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, * * * then he is not guilty, and you

should acquit him, unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions.

If the defendant was in fact ignorant of the overdraft, and if his ignorance was not willful, he was entitled to an acquittal without the slightest reference to whether the exchange deposited was sufficient to cover the certified checks or not. The reference contained in the instruction to the question as to whether the exchange deposited was sufficient to cover the certified checks was wholly irrelevant and misleading; and the court readily detected that if it submitted the irrelevant part of the hypothesis, without mentioning the existing overdraft, the jury might, and probably would be misled into basing their verdict on the fact that the exchange deposited equaled the checks certified; without remembering that the exchange deposited must in law be first applied to the absorption of the existing overdraft.

The ingenuity displayed in the instruction as originally presented, consisted in the attempt to make the words "*the amount of said checks*" dominate the entire instruction; so that if the jury happened to find that the exchange deposited was sufficient to cover "the amount of said checks," they would acquit the defendant; even though the jury were of opinion that the defendant knew of the existence of the overdraft.

The court had distinctly told the jury that—

If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins & Dazey

did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof, beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

This was a full and fair statement of the law so far as it related to defendant's ignorance of the overdraft, and it was as favorable a statement as he could well have asked.

As the court had thus given him the full benefit of that proposition, he had no right to involve the same proposition in a special instruction so drawn as to be calculated to mislead the jury into believing that he was entitled to be acquitted, if the exchange deposited was sufficient to "*cover the amount of said check,*" notwithstanding it was insufficient to cover the existing overdraft.

The modification made by the court in the instruction was correct for another reason:

The instruction as presented to the court proceeded upon the theory that if defendant was in fact ignorant of the overdraft, and he certified the checks believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which the respective checks were certified was sufficient to cover the amount of said checks, then he was not guilty.

Section 5208 of the United States Revised Statutes declares it to be unlawful to certify a check unless the

drawer "has on deposit" at the time such check is certified "an amount of money equal to the amount specified in such check."

The act of Congress of July 2, 1882 (see acts 1881-82, chap. 290, p. 162), prohibits the certification of a check "before the amount thereof shall have been regularly entered to the credit of the dealer upon the books" of the bank.

The mere fact that Dobbins & Dazey may have brought into the Commercial Banking House certain New York exchange and delivered it to the teller did not in law constitute "a deposit." It did not in contemplation of law become a deposit until the exchange "had been regularly entered" to their credit on the books of the bank; and the moment that the exchange was entered to their credit on the books the law instantly appropriated it to the absorption of the existing overdrafts; and if the overdrafts exceeded the exchange, Dobbins & Dazey would have had no money at all on deposit, notwithstanding they may have handed the exchange to the teller not five minutes before.

To illustrate: When the bank opened on the morning of December 9, 1892, Dobbins & Dazey's account was overdrawn \$114,194.01. They deposited that day, in "kiting" drafts on New York, \$50,153.30. The very instant that those drafts were entered to their credit upon the books of the bank they were appropriated to the absorption, pro tanto, of the overdrafts; and five minutes afterwards, instead of their having the amount of said drafts "on deposit" to their credit, they were indebted to the bank \$64,040.71.

On that day the defendant certified their check for \$15,000.

Now assume (though only for the sake of argument) that at the opening of the bank on the morning of December 9, 1892, the defendant was wholly ignorant of the fact that Dobbins & Dazey's account was overdrawn.

Assume also that he was standing by and saw Dobbins & Dazey when they handed the \$50,153.30 of drafts to the teller, would he have been justified, either legally or morally, in certifying their check for \$15,000 before the drafts were entered to their credit on the books of the bank? Certainly not.

Because, even though he may have been ignorant of the fact that there *was* an overdraft he surely knew *that there might be an overdraft*; and he was bound to know, as a matter of law, that if there was an overdraft in excess of the "kiting" drafts, Dobbins & Dazey would not have anything at all "on deposit."

The defendant knew that when Dobbins & Dazey first placed their account with the bank the executive committee, and the defendant, who was a member of that committee, understood that the business of Dobbins & Dazey was one of great magnitude. The defendant also knew that Mr. Dudley, one of said committee, objected to the account on the ground that, having been in the cotton business himself, he (Dudley) "*believed they would be likely to overdraw their account.*"

The defendant also knew, when the account was finally taken, that the cashier was directed by the committee, and in defendant's presence, not to allow Dobbins & Dazey to overdraw their account.

The defendant also knew that four of the checks certified by him varied in amounts from \$11,724.89 to \$40,000.

He could not recollect that he had ever certified a check for anyone, except Dobbins & Dazey, for as much as \$10,000.

And, with only one exception, every check of Dobbins & Dazey certified by the defendant, was larger than the largest check of any other person that was certified by said bank during the entire period from July 11, 1890, to the failure of the bank in March, 1893.

When we consider that the defendant knew of the great magnitude of the business of Dobbins & Dazey; that he knew of the liability of all cotton houses to overdraw in bank; that he knew that special orders were given to the cashier not to allow Dobbins & Dazey to overdraw their account; that he heard soon after their account was taken at the bank that it was overdrawn, though afterwards made good; and that he knew that the checks of Dobbins & Dazey certified by him were for enormous amounts as compared with ordinary checks on the bank; it is impossible to believe that he was either legally or morally justified in certifying their checks, merely because he may have seen or heard of certain "kiting" drafts being handed into the teller by them, without his ever undertaking to inform himself as to how their account would stand after those drafts should have been entered to the credit of Dobbins & Dazey on the books of the bank. And yet that is in substance what the court was asked to tell the jury in the instruction, the modification of which is complained of in this assignment.

EIGHTH ASSIGNMENT.

The eighth assignment is that there is error "in the refusal of the defendant's seventh request for special instructions," which was as follows:

If you find from the proof that the defendant believed and understood at the time the account of Dobbins & Dazey was taken and during its existence at the Commercial National Bank that they were engaged in the purchase of cotton and its shipment to New York and other Eastern points; that they had numerous branch offices and agencies in various States of the South, where the cotton was purchased; that the Nashville office was the parent office of the firm, upon which drafts were drawn by the branches and agents at other points for the payment of the cotton so purchased, accompanied with bills of lading; that the payment of these drafts drawn upon the parent house required large amounts of money; that to provide such funds the parent house expected to deposit and that they were depositing to their credit in the Commercial National Bank drafts on their correspondents in New York, secured by bills of lading for cotton, and then drawing their checks on the Commercial National Bank against such deposits; and that their deposits were expected to consist, and did consist, mainly of such New York drafts; if you believe from the proof that the defendant understood and believed that this course of business was to be and was, in fact, being pursued by Dobbins & Dazey at Nashville, and that the volume of such business would be large and likely to require the sale of exchange by the bank in order to keep supplied in cash funds, and the defendant had no knowledge at the time he certified the checks mentioned in the

indictment that Dobbins & Dazey, instead of conducting a legitimate business in this way, were wiring money to New York through another bank in order to sustain the system of "kiting" as developed by the proof on this trial, and that, having no knowledge of the overdraft of Dobbins & Dazey's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed they were making such daily deposits of New York exchange and then drawing against them, and (that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day, and was in bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him).

The latter part of this instruction which is inclosed in parentheses was modified by the court and given to the jury, and the action of the court in modifying that part of the instruction and giving it to the jury, is made the basis of the ninth assignment of errors, which will be discussed hereafter.

The error complained of in this assignment is that the court refused all of the instruction except that part inclosed in parentheses.

The court declined to give the main part of the instruction, indorsing thereon as follows: "Declined. The main part of this request is a recital of part of the evidence only, and is argumentative. The latter part is correct and is given."

The main part of this instruction which was refused by the court ignores all the proof offered by the Govern-

ment, and calls the attention of the jury only to the strong features in the defendant's favor.

The defendant might as well have had his testimony printed and submitted to the jury and then have asked the court to instruct the jury that if they believed the defendant's testimony (without reference to all of the other evidence in the case), or if they believed the argument of the defendant's counsel, they should acquit him.

NINTH ASSIGNMENT.

The ninth assignment is that the court erred in modifying that part of the instruction discussed in the eighth assignment inclosed in parentheses and giving it to the jury.

As modified, the instruction given was as follows:

(If you find) that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, (I add, in addition to the existing overdraft), he would not be guilty under the indictment, and you should acquit him.

It will be noticed that the modification in this instruction is identical with the modification made by the court in the defendant's fifth request for special instruction and complained of in the seventh assignment of errors. This modification has been fully considered and discussed in the comments of this brief upon the seventh assignment of errors.

The language used by the defendant in this request was well calculated to make the words "*cover the checks*"

certified" dominate the entire instruction, so that if the jury should happen to find that defendant had information from the cashier or exchange clerk upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank "*to cover the check certified,*" they would acquit the defendant even if the jury believed that the defendant knew of the overdraft.

TENTH ASSIGNMENT.

The tenth assignment is, that there is error in the refusal of defendant's ninth request for special instructions, in connection with the eighth, which was given, which ninth request was as follows :

(9) The defendant's want of knowledge of the state of the account of Dobbins & Dazey at the time he certified checks, will be a complete defense to him, unless you are satisfied beyond a reasonable doubt, that such want of knowledge proceeded *from a will to disobey the law, or from an indifference to its commands.*

The court refused this instruction, indorsing on it : "Declined, as liable to mislead as to the character of the purpose."

The court had already, in effect, instructed the jury upon this point.

The eighth special instruction, asked by defendant, and granted, with the addition by the court of the words in parentheses was as follows :

(8) If the proof fails to satisfy to your minds clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that Dobbins

& Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he *willfully, designedly, and in bad faith (these words mean substantially the same thing) shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.*

The court, at the defendant's request, used the phrase "willfully, designedly and in bad faith shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge;" the court was not bound to repeat the same idea in the equivalent phrase "proceeded from a will to disobey the statute or from an indifference to its commands."

While the court was not bound to do so, it did in effect, repeat the same idea in another part of the charge in discussing the question as to the credit to which the testimony of Porterfield was entitled. He said :

Whatever credit his testimony delivered here may be entitled to, the question remains with you to settle upon all the evidence, whether the defendant Spurr, in certifying these checks, acted in good faith, *and without any attempt to do that which the law forbids, etc.*

The instruction asked for had been substantially given. It was not an error to refuse it.

ELEVENTH ASSIGNMENT.

The eleventh assignment is, that there is error in the action of the court in responding to a question of the jury on their return into court after being charged, in reading twice section 5208 of the

Revised Statutes, and in failing to read and explain the act of Congress of 1882, on which the indictment is based, in response to the jury's question, and in the further instructions of the court in that connection, which were not called for by the jury—which question, action of the court thereon, and further instructions, were as follows:

The jury came into court and asked the following question, which was written out in pencil and handed to the court: "We want the law as to the certification of checks, when no money appeared to the credit of the drawer."

The COURT. The jury state they want the law as to the certification of a check when there is no money to the credit of the drawer. I can not better answer this question, which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject:

"It shall be unlawful for any officer, clerk, or agent of any national banking association, to certify any check drawn upon the association, unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check."

The COURT: Does this answer your question?

FOREMAN OF THE JURY: Yes, sir.

The COURT: I read it again, so that you may all understand it. (Court reads that part of section 5208, Revised Statutes, as quoted.)

The COURT. Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit or line of credit.

I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that, the obligation of the bank to meet it is made so by the act of the officer who certifies it to be good. *That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*

There is omitted from this assignment the material fact, that at the conclusion of the judge's response to the jury's request, he said, "You understand what I have said now is to be taken in connection with what I have before instructed you."

The jury asked for "the law as to the certification of checks when no money appeared to the credit of the drawer." The court said, very properly, that it could not better answer the question, than by reading the section of the Revised Statutes which relates to the subject.

The Court having read the section to the jury, the following colloquy occurred:

THE COURT: Does this answer your question?

FOREMAN OF THE JURY: Yes, sir.

THE COURT: I read again, so that you may all understand it.

It is seriously argued, in effect, that the jury did not know the meaning of the question which they had asked; that the court did not know how to answer the question

that had been asked; and that the jury did not know whether the answer which the court gave was an answer to the question which they had asked. If ignorance, both upon the part of the jury and the part of the court, is to be presumed, how are the proceedings of any nisi prius court to be upheld in an appellate tribunal?

In order that there should be no doubt as to whether the reading of the statute gave to the jury "the law as to the certification of checks," which was the only law that the jury desired to know, the court asked the jury if the reading of the section had answered their question; and the jury replied in the affirmative.

The jury did not ask for the law "prescribing the penalty for false certification," because it was no part of their function to fix the penalty. The court therefore properly declined to read that law to them.

The jury had been fully instructed in the main charge, as to the meaning and effect of the word "willful" as used in the act of 1882; and, in the remarks made by the court to the jury when they asked for "the law as to the certification of checks," the court was careful to state specifically that "*what I have said now is to be taken in connection with what I have before instructed you.*"

It is impossible for the jury to have supposed that the court, on the occasion referred to, intended to instruct that "the mere certifying by an officer of the bank, when there are no funds there to meet it," constituted an offense under the statute; when the court expressly told the jury that those words were to be taken in connection with the main charge, in which the court had fully explained the meaning and effect of the word "willful."

The court had used the word "willfully," and had instructed the jury that the certification of the checks must have been done willfully, designedly, and in bad faith.

The eighth special instruction, asked by defendant, and granted, with the addition by the court of the words in parentheses, is as follows :

(3) If the proof fails to satisfy to your mind clearly and beyond a reasonable doubt that the defendant did actually know *at the time he certified the checks mentioned in the indictment* that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits *to meet the checks so certified*, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he *willfully, designedly, and in bad faith (these words mean substantially the same thing)* shut his eyes to the fact and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.

The court also said to the jury :

If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of *the checks certified by the defendant*, and that the defendant was in fact ignorant of such overdraft; *and that he certified the several checks mentioned in the indictment*, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which *said checks were certified* was sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, unless such ignorance of the overdrafts was *willful*, as elsewhere explained in the court's instructions.

It will be seen that the court twice used the word "willful;" and used it as applied to "the false certification of checks."

It will also be seen that the court explained to the jury that the word "willfully" means substantially the same as "designedly and in bad faith."

In the Potter Case the Supreme Court said that the word "willful" implies two things:

First: "Knowledge."

Second: "A purpose to do wrong;" i. e., "a bad purpose," "a bad intent," "an evil intent." (155 U. S., p. 446, *U. S. v. Potter*.)

First, as to "*knowledge*:" The court in this case instructed the jury as follows:

The Government is bound, in order to maintain any of the counts in these indictments, to prove:

First. That the defendant certified the checks.

Second. That the drawers of the checks had not sufficient funds in the bank to meet such checks.

Third. That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modifications stated further on.

Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawer was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.

Again the court said:

In determining these questions you are to look to all the evidence bearing upon his *knowledge* and give all its just effect.

Again the court said to the jury:

It will be proper for you to keep in mind these facts, together with the by-laws relating to those two officers, in connection with the other proof in the case, bearing on the question *whether the defendant had knowledge* of the state of the account of Dobbins & Dazey at the time when he certified the checks of that firm which are mentioned in the indictment, and give to them such weight as you think they are justly entitled to on the question whether or not the defendant *did actually know* of the state of that account at the time he certified said checks.

Again the court said:

If you find beyond a reasonable doubt that the defendant *did know* of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not of itself establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question *whether the defendant knew*, or was charged with *knowing* because he purposely abstained from knowledge, at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

Second. As to the "*purpose to do wrong*," the court said:

And, in general, if the defendant acted in *good faith* in making these certifications, believing that

the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by *bad faith* would not render him guilty.

Again, the court said:

If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so *in good faith*, believing those statements and representations to be true, and such statements were made at or so near the time of the certification as to be fairly regarded as indicating the present state of the account, his certification, *made in honest reliance upon them*, would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and right conduct as respects the affairs of the bank, the defendant would have the right to rely upon his statements in regard to that account.

The court, in speaking of Porterfield's testimony, said:

Whatever credit his testimony delivered here may be entitled to, the question remains with you to settle, upon all the evidence, whether the defendant Spurr, in certifying these checks, *acted in good faith and without any attempt to do that which the law forbids*, and which he must be presumed to know as unlawful, namely, the certifying of the check as good when the maker of it has no funds in the bank to meet it. *If he acted in good faith*, believing that the makers of the checks had funds in the bank to pay them, he should be acquitted.

As shown by the foregoing quotations, the court not only used the word "willfully," but used it twice, and used it "with reference to the false certification of checks;" and, as also shown by said quotations, the court

explained to the jury that the word "willfully" meant substantially the same thing as "designedly and in bad faith."

It will also be seen that the court again and again told the jury that the defendant could not be convicted unless he acted—

First. "With knowledge."

Second. "With a purpose to do wrong," *i. e.*, with "an intent to do that which the law forbids," or with "bad faith."

The court, therefore, gave the defendant the full benefit of both of the elements of "willfulness," as defined by the Supreme Court in the Potter Case.

TWELFTH ASSIGNMENT.

The Government, against the defendant's objection, introduced certain testimony tending to show that as early as 1886-87 the defendant knew that he and Porterfield were speculating in stocks in New York through Kohn, Popper & Co., De Neufville & Co., and Latham, Alexander & Co.; and that defendant also knew that Porterfield was using the bank's money in those speculations without the knowledge or consent of the directors or committees of said bank. The general purport of said testimony is set forth in the printed record.

The twelfth assignment is, that "it was error to admit the testimony relating to these transactions of 1886 and 1887 over the said objection of defendant, (and that) said objection should have been sustained, and such testimony rejected."

In the statement of the case made in this brief, the Government's evidence in regard to these transactions has been shown.

The Government anticipated that the defendant would testify that in certifying the checks for which he was indicted, he got his information in regard to the condition of the account of Dobbins & Dazey from Porterfield, the cashier.

The Government, therefore, as part of its case in chief, offered proof of certain purchases and sales of stocks on the New York Stock Exchange, in 1886-87, through Kohn, Popper & Co., DeNeufville & Co., and Latham, Alexander & Co., all of New York, in the name of F. Porterfield, cashier of the Commercial National Bank, for the account of sundry customers of said bank, including F. Porterfield, the cashier; R. S. Cowan, the assistant cashier, and the defendant, the president.

The Government also offered evidence tending to show by memoranda, charge and credit tickets, deposit slips, pencil statements and calculations, all in the handwriting of F. Porterfield, and by accounts and statements from the books of New York bankers and brokers, certain purchases and sales of stocks, made with the funds of said bank, remitted to New York by said Porterfield, for account of defendant and the other persons named.

The Government also offered evidence tending to show that some of those transactions resulted in profits, and some of them resulted in losses; that the profits and losses were divided equally between defendant and Porterfield; or divided between defendant, Porterfield, and Cowan; that said divisions of profits and losses between

said parties were made from memoranda, statements, calculations, etc., which were in the handwriting of Porterfield; that the profits made by defendant in said transactions were credited to him on the books of said bank at the time of said sale, and were afterwards credited on his pass book and drawn out by him.

The Government also offered evidence tending to show that the account which was originally opened with DeNeufville & Co. in the latter part of 1886 was afterwards transferred to Latham, Alexander & Co., and that it continued thereafter with them down to the failure of the bank.

As one evidence that defendant knew that the bank's money was being used by Porterfield in said transactions, the Government proved that in one of them there was a loss of \$9,762.35; and that the defendant gave his note to said bank for \$3,254.12, it being his one-third of said loss; that he afterwards twice renewed said note; and that he did not at any time inform the executive committee or directors of the bank that said notes, or any part of them, were given to cover losses on stock.

At the time of the trial the last one of said renewal notes was still unpaid.

As to the admissibility of said testimony, the court said:

I greatly doubt whether it would be admissible, on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose. * * *

I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact, whether he did rely upon any assumed correctness or honesty of action:

The contention of the Government was that, under the decision of the Supreme Court in *Potter v. United States* (156 U. S., 446), it was necessary for the Government to show, first, "knowledge," and, second, "a bad intent;" that knowledge might be actual or constructive; that the collateral transactions above referred to proved that defendant knew that Porterfield had been misapplying the moneys and funds of the bank in their joint speculations; and therefore that defendant had no right to certify to the affirmative fact that a check of Dobbins & Dazey was good, in sole reliance (as he stated) upon Porterfield's representations.

In other words, the Government contended that said collateral transactions showed that defendant had such an intimate knowledge of Porterfield's conduct during that long period of time that for defendant to rely upon any statement made to him by Porterfield in reference to the account of Dobbins & Dazey (especially in view of the fact that defendant and Porterfield were at the time speculating in cotton futures through Dobbins & Dazey) placed defendant in the category of one who "had designedly abstained from inquiry for the purpose of avoiding notice."

The court, in its charge, said:

The defendant is not indicted in this case, nor being tried for buying and selling stocks or bonds

or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters, on his individual account, without involving the bank. You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions, or that he knew that the cashier was using the funds of the bank for his own personal interest, or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence, on the question whether defendant knew (or was charged with knowing, because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the indictment, that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

The court also instructed the jury as follows :

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.

Again the court said :

If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr,

in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would in the exercise of his own duties have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

These collateral transactions were clearly competent for the purpose to which the court, in its charge, restricted them.

It is contended by the defendant that this evidence was not irrelevant to the charges of the indictment.

It was not only relevant, but essential, that the Government should prove that the defendant had "*knowledge*" of the condition of Dobbins & Dazey's account; because knowledge is one of the main elements of "*willful*."

See 155 U. S., p. 446, *Potter v. United States*.

See 153 U. S., p. 594, *Evans v. United States*.

See 96 U. S., p. 702, *Felton v. United States*.

When a person designedly abstains from inquiry for the purpose of avoiding notice, his status is precisely the same as though he had actual knowledge.

See 142 U. S., p. 439, *Simmons Creek Coal Co. v. Doran*.

As the defendant knew, as far back as 1886-87, that Porterfield was misapplying the moneys and funds of the bank in their joint speculations, he had no right to certify to the affirmative fact that a check of Dobbins &

Dazey was good, in sole reliance (as he himself states) upon Porterfield's representations.

The defendant avoided the ledgers, the teller, and the bookkeeper from whom he knew he could get the truth; and (as he says) got his information from Porterfield, whom he knew had for years been misapplying the funds of the bank, and therefore was unreliable. In so doing the defendant "designedly abstained from inquiry," and did it "for the purpose of avoiding notice." His status, therefore, was precisely the same as if he had had actual knowledge; and the collateral evidence above referred to was admitted by the court as evidence of that knowledge.

See 142 U. S., 439, *Simmons Creek Coal Co. v. Doran*.

See 53 Fed. Rep., 658, *United States v. Graves*.

It is contended that this evidence was not admissible on account of remoteness in time.

The transactions referred to in the evidence were not admitted by the court as any part of the *res gestæ* of the transactions involved in the indictment. On the contrary, the court said:

I greatly doubt whether it would be admissible, on the ground of remoteness of time; but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action and honesty of purpose.

In other words, the evidence was admitted by the court upon the sole ground that it tended to show that the defendant knew that he had no right to rely upon Por-

terfield, and that he had been in possession of this knowledge as far back as 1886-87.

It is manifest that the longer the defendant had been possessed of knowledge of Porterfield's unreliability, the less excuse can he have for acting upon Porterfield's alleged statements.

It is also contended that there is want of connection between the transactions referred to in the testimony and those involved in the indictment.

The transactions referred to in the evidence were not admitted upon the theory that they were any part of the *res gestæ*, or that they were in any way connected with the transactions involved in the indictment. The only ground upon which they were admitted was that they tended to show defendant's knowledge.

The transactions involved in the evidence were not admitted by the court upon the theory that they were in anywise similar to the transactions involved in the indictment; but, as repeatedly stated above, they were admitted for the sole purpose of proving the fact of knowledge, as one of the elements of the word "willful."

The numerous authorities which defendant's counsel have collected with great diligence on the subject of "remoteness in time," not "contemporaneous," "want of connection;" "want of similarity;" etc., could doubtless have been multiplied many times over; but they have no bearing upon the question before this court, as the court below did not base its action on either of the grounds which those authorities are cited to condemn.

It is suggested that the transactions involved in the evidence were not shown to be fraudulent; or if so, that defendant had any knowledge of the fraud.

The evidence certainly tended to show that the defendant and Porterfield were jointly speculating in stocks; that Porterfield was keeping the account of the transactions and reporting how the profits and losses should be divided; that the defendant was accepting his share of the profits and losses from time to time as reported by Porterfield; and that defendant was using, as his own, the moneys thus realized as profits. The defendant certainly knew that Porterfield was using the moneys of the bank in those speculations, because he does not pretend that he furnished any moneys as a margin; he admits that he gave his note to the bank for \$3,254.12 which was his share of the loss in one of the speculations in which he and Porterfield had been engaged; and he surely would not have given that note to the bank if he had not have known that it was the bank's money which had been lost in the transaction. The evidence also tended to show that neither at the execution of the original note nor at the execution of either of its renewals did he inform the executive committee that it represented money of the bank which had been lost by him and Porterfield in speculations; and it also tended to show that the moneys of the bank that were used by Porterfield in the joint speculations of himself and the defendant were so used without the knowledge or consent of the bank, its directors or committees.

If these transactions were not shown to be fraudulent, it would be very difficult to find a state of facts that would be fraudulent; and if the evidence admitted did not tend to show that the defendant had knowledge of the fraud, it would not be possible in any case to furnish evidence of fraud.

THIRTEENTH ASSIGNMENT.

The thirteenth assignment is that there is error in the following language of the charge of the court, on the subject of the transactions mentioned in the twelfth assignment of error:

The using, by its officers, of the funds and credits of a national bank in speculation on stock and cotton exchanges carried on in the interest of the bank or its officers as individuals, or any other persons, is unlawful. Their franchises do not contemplate such operations and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculations in his own, or other person's interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations.

The first proposition contained in the language of the court quoted in this assignment is that—

The using, by its officers, of the funds and credits of a national bank in speculation on stock and

cotton exchanges carried on in the interest of the bank or its officers, as individuals, or any other persons, is unlawful.

Dealing in stocks, though not expressly prohibited to national banks, is implied from the failure to grant the power. (See 92 U. S., 128, *First Nat. Bank v. Nat. Exchange Bk.*)

The second proposition is that the franchises of national banks "do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misapplication of the property of the bank."

This proposition is a corollary of the first proposition, and therefore must be equally sound. If it be unlawful for the officers of a national bank to use its funds and credits in speculations in stocks and cotton, carried on in the interest of the bank, or its officers or other persons, such use is necessarily an abuse of the lawful powers of the bank and a misapplication of the property of the bank.

The third proposition is that the fact that other national banks "were engaged in such business did not render it legal, nor can the opinion of other persons that it was proper rightfully affect the view which the court and jury must take of the legality of such practices."

It certainly can not be seriously contended that the practices of other national banks, or the opinion of other persons, can rightfully affect the view which a court and jury must take of the legal question as to whether the officers of a national bank have the right to use its funds in stock speculations.

The fourth proposition is that if Porterfield "was engaged with the knowledge of defendant in thus misusing

the credits and funds of the bank on cotton and stock exchanges, in speculations in his own or other persons' interests, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank."

Porterfield, as the evidence tended to show in this case, was purchasing and selling the stock for outside customers of the bank. He stood between these customers and the bank, and is interested so to protect the bank as against these customers; but when he, with the knowledge of the president, took the moneys and funds of the bank without the knowledge or consent of the directors or committees of the bank and used them in speculating in stock for the individual benefit of the defendant and himself, dividing between them the money that represented profits, and giving their notes to the bank when losses occurred, not even informing the executive committee, who discounted the notes, that they represented moneys of the bank which had been lost in speculation, that conduct of itself certainly placed the defendant in a position where he would not have the right to rely upon Porterfield's integrity and fidelity to the interest of the bank.

FOURTEENTH ASSIGNMENT.

The fourteenth assignment is that there is error in the refusal of defendant's thirteenth request for special instructions on same subject, which was as follows:

Although a national bank has no authority by law to receive and execute orders from its customers for the purchase and sale of stocks and bonds upon

margin, yet if you find from the proof that it was customary for the national banks of this city to do such business, and that the Commercial National Bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge of or reason to suspect the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant can not and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier order for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities, as other customers were required to do.

The fact of the first part of this instruction is to tell the jury that even though it was unlawful for the national bank to use the funds of the bank in buying and selling stocks, yet if the other national banks of Nashville were in the habit of doing such business, and the Commercial National Bank also embarked in that business in order to make money for the bank, that then there would be no moral turpitude in so doing.

This instruction is exactly opposed to the instruction given by the court and discussed in the thirteenth assignment. If that instruction is right, this instruction is wrong.

The fact that other national banks in Nashville were unlawfully speculating in stocks was no reason why the

Commercial National Bank should embark in the same unlawful business, and if the defendant and Porterfield did embark in such business, the law presumes that they knew it to be unlawful.

The fact that the Commercial National Bank dealt in stocks and bonds upon margin with the knowledge and approval of its board of directors was wholly immaterial, because the board of directors has no right to approve such transactions. The fact that the bank charged commissions and interest, the fact that the business was a fruitful source of revenue or profit to the bank, and the fact that such profits were received and distributed among the stockholders are all immaterial. Such profits were illegal and ill-gotten gains, and the stockholders could no more legalize the transactions than could the directors. Neither the stockholders nor the directors, nor all of them combined, have the right to convert a national bank into a bucket shop, to dabble in stocks and bonds on margins. The history of the Commercial National Bank furnishes an all-sufficient reason why such practices on the part of national banks should be severely condemned by the courts.

The request which is made the basis of this assignment seeks to make unduly prominent the dealings which the Commercial National Bank had in stocks and bonds for some of its outside customers, and it seeks to unduly subordinate the dealings which were carried on by Porterfield for himself and the defendant.

An instruction which overlooks or ignores all the proof offered by the other side, and calls the attention of the jury only to the strong features in the party's own favor,

should be refused. (4 Fed. Rep., 357, *Behr v. Connecticut Mut. Life Ins. Co.*)

Said request asked the court to instruct the jury that if "the defendant had no knowledge of or reason to suspect the unfaithfulness or *dishonesty* of the cashier in his conduct of such transactions, then the defendant can not and ought not to be prejudiced in this case," etc.

The court did right in declining to use the word "*dishonesty*" in the peculiar connection in which the court was asked to use it. The term "*dishonesty*," while universally recognized as entirely appropriate, where some poor and obscure man steals a small amount of money, is not recognized by some of the modern sentimentalists as at all applicable to a cashier who misapplies hundreds of thousands of dollars of his bank's money, even though he may use them in speculating for himself and the president. The court, therefore, did not intend to leave it for the jury to decide whether the misapplication of the bank's money by Porterfield, in conducting the joint speculations of himself and the defendant, was or was not technical "*dishonesty*."

Said request also asked the court to instruct the jury that the defendant can not and ought not to be prejudiced in this case by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own money or securities as "other customers" were required to do.

There is a very wide distinction between "other customers" and the defendant. In dealing with "other customers" the bank had the president and cashier to

rely upon to protect the bank's interest ; but when the president and the cashier of the bank conspire together to use the bank's money in their joint speculations, without the knowledge of the directors and committees of the bank, the bank has no protection whatever.

FIFTEENTH ASSIGNMENT.

The fifteenth assignment is that there is error—

In the modification of defendant's tenth request for special instructions, by striking therefrom the word "truth," and inserting instead thereof the words in brackets, namely, "right conduct as respects the affairs of the bank," which said instruction, so modified, and showing the word stricken out in italics and the substituted words in brackets, was as follows :

"If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, and such statements were made at or so near the time of the certifications as to be fairly regarded as indicating the present state of the account, his certifications, made in honest reliance upon them, would not be criminal ; and if the cashier was reputed to be and believed by the defendant to be a man of honesty and *truth* [right conduct as respects the affairs of the bank], the defendant would have the right to rely upon his statements in regard to that account."

The court, in substituting the words "right conduct as respects the affairs of the bank" for the word "truth,"

did exactly right. The cashier may have been reputed to be a man of "truth" in all of his outside dealings; and he may have established a reputation for "truth" in such dealings, not only with the community at large, but with the defendant also. He may also have been a man of "truth" with reference to the transactions of the affairs of the bank; and yet, however truthful he may have been, if the defendant knew that he was not a man of "right conduct as respects the affairs of the bank," the defendant had no right to rely upon his statements in regard to Dobbins & Dazey's account.

If the defendant knew that Porterfield had been using the funds of the bank to margin his own or defendant's speculative accounts, he knew that Porterfield had been guilty of a misapplication of the funds of the bank, and that such misapplication was a penitentiary offense.

The objection which defendant urges to the modification made by the court is that it makes the defendant's knowledge of what he calls the "technical" violation of the national banking law by Porterfield as cashier in the purchase and sale of stocks on margins, the test of the defendant's right to rely on Porterfield's statements in regard to the Dobbins & Dazey account.

It may suit the fastidious sensibilities of bank officers who wreck their institutions, to call the misapplication of the bank's funds a mere "technical" violation of the law; but Congress has constituted and declared it a penitentiary offense, and the courts must follow the definition by Congress rather than that by bank officials.

The evidence tended to show that when the national banks in Nashville first began to deal in stocks and

bonds "*it was not considered by the directors (of the Commercial National Bank) as exactly the right thing to do,* but that as all the other banks were doing it, and were receiving the profits, the Commercial National Bank commenced doing it for its customers."

In other words, the defendant knew that the cashier of that bank, *with knowledge that it was not "exactly the right thing to do,"* willfully misapplied the funds of the bank, during a long period of time, in the purchase of stocks and bonds for the joint account of himself and the defendant; and yet we are told that if the defendant believed Porterfield to be a man of mere "truth," defendant had the right to rely upon his statements with reference to the account of Dobbins & Dazey; notwithstanding the defendant also knew that the cashier, as well as himself, was speculating in cotton futures through Dobbins & Dazey, at the time the defendant was certifying the checks of that firm.

SIXTEENTH ASSIGNMENT.

The sixteenth assignment is that there is error—

in the modification of defendant's eleventh request for special instructions on same subject, by striking therefrom the words, "was despoiling the bank and using its funds," and inserting instead thereof the words in brackets, namely: "had been using the funds and credits of the bank;" and by also striking therefrom the word "dishonesty," and inserting instead thereof the words in brackets, namely: "unlawfully in respect to its affairs"—said special instruction as so modified and showing the words

stricken out in italics and those substituted in parentheses, was as follows :

"The fact that the cashier had bought and sold stocks and bond or cotton futures, and that defendant knew the fact would not establish or imply that he was personally dishonest, nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier *was despoiling the bank and using its funds* (had been using the funds or credits of the bank), instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and acting *dishonestly* (unlawfully in respect to its affairs)."

The modification as made by the court, stated the law correctly.

If the defendant knew that the cashier "had been using the funds or credits of the bank, instead of his own," in speculating in stocks or bonds or cotton futures, the defendant was bound to know that Porterfield was guilty of a misapplication of the funds of the bank, and therefore, guilty of a penitentiary offense.

As to whether the use of such funds, under such circumstances, by the cashier, amounted to "despoiling the bank," there might be a difference of opinion among jurors, arising from the different meanings which different persons might attribute to the word "despoiling."

The court, therefore, wisely selected words which the jury could readily understand; and directed them that the defendant would not have the right to rely upon the cashier, if he knew that the cashier "had been using the

funds or credits of the bank instead of his own" in "speculating in stocks, bonds or cotton futures."

The court was also correct, in that particular connection, in substituting for the word "dishonestly" the words "unlawfully in respect to its affairs." Jurors might differ as to whether the unlawful use by the cashier of the funds or credits of the bank instead of his own, in speculative transactions, was acting "dishonestly;" but they could not differ as to the meaning of the words employed by the court in place of the word "dishonestly."

The word "dishonestly" jars upon the sensitive nerves of bank wreckers; and, in their polite parlance, acts which plain people consider as dishonest are classed as mere "irregularities." But the act which Congress has branded as a penitentiary offense is the willful misapplication of the bank's moneys, funds or credits; and that is the act of which Porterfield was guilty, if, without the knowledge or consent of the directors and committees of the bank, he "used the funds and credits of the bank instead of his own in speculating in stocks, bonds, or cotton futures."

SEVENTEENTH ASSIGNMENT.

The Government introduced testimony against the defendant's objection with respect to an account of Hersfeld & Co., with "Frank Porterfield, separate," and in respect to another account of Latham, Alexander & Co., with "Porterfield and Spurr," heretofore commented upon in the statement of the case in this brief.

The seventeenth assignment is that "It was error to admit the testimony relating to those two accounts over

said objection of defendant. (And that) said objection should have been sustained and such testimony rejected."

This testimony tended to show, in brief, that the account of Herzfeld & Co. with "Frank Porterfield, separate," was opened in March, 1889; that the account of Latham, Alexander & Co. with "Porterfield and Spurr" was opened in October, 1889; that both of said accounts continued down to the failure of the Commercial National Bank, in March, 1893; that both of them were joint accounts in which the defendant and Porterfield were equally interested; that large amounts of the moneys of said bank were sent by Porterfield, as cashier, to Herzfeld & Co. and to Latham, Alexander & Co. from time to time, down to the failure of said bank; that said moneys were sent to margin said accounts; that said moneys were sent with the knowledge of the defendant; and that they were sent without the knowledge of the directors or committees of said bank.

These accounts of Herzfeld & Co. and Latham, Alexander & Co., covering a period from 1889 down to the failure of the Commercial National Bank, in 1893, were in all respects similar to the accounts of Kohn, Popper & Co., and De Neufville & Co., which were current in 1886-87, and which have been commented on in this brief in the twelfth assignment of error.

In the comments on the twelfth assignment of error it was shown that the testimony relating to the accounts of Kohn, Popper & Co. and De Neufville & Co., current in 1886-87, was properly admitted, on the ground that it tended to show that as far back as 1886-87 defendant knew that Porterfield was, without the knowledge or

consent of the directors or committees of the bank, and with the knowledge and consent of the defendant, using the bank's moneys, in the joint speculations of himself and the defendant; and, therefore, that defendant had no right to rely upon Porterfield's (alleged) representations in regard to the condition of Dobbins & Dazey's account.

The testimony relating to the accounts of Herzfeld & Co. and Latham, Alexander & Co. was properly admitted on the same ground as the testimony relating to the accounts of Kohn, Popper & Co. and De Neufville & Co.

As the accounts of Herzfeld & Co. and Latham, Alexander & Co. continued down to the failure of the bank, they were admissible to show that the knowledge of Porterfield's unreliability, which defendant acquired as early as 1886-87, was repeatedly refreshed and strengthened from time to time down to the failure of the bank.

EIGHTEENTH ASSIGNMENT.

The eighteenth assignment is that there is error—

in the refusal of defendant's fourteenth request for special instructions in reference to personal dealings in stocks by Porterfield and Spurr, which was as follows:

"The fact that the defendant, jointly with Frank Porterfield, bought railroad stocks through Latham, Alexander & Co. in their joint personal names and with their own means, is not evidence of the dishonesty of either, nor is the fact that they bought, in the same way, similar stocks in the name of Porterfield individually, through Herzfeld & Co.; and if you

believe that these accounts were mere personal transactions, not involving the bank in any way, so far as the defendant was concerned, and he did not know of, or consent to, the use of the bank's funds by Porterfield in those transactions, he can not be affected and ought not to be prejudiced by any such misuse of the bank's funds by Porterfield."

The court refused the instruction requested, "because the subject was covered by other instructions."

The "other instructions" referred to were as follows:

The court gave the twelfth special instruction asked by the defendant, after modifying it in a manner not excepted to, as follows:

12. The defendant is not indicted in this case nor being tried for buying and selling stocks or bonds or cotton futures, nor is it any crime against the laws of the United States for a bank officer to deal in such matters. (I interpolate: On his individual account, without involving the bank.) You should not allow the proof on this subject to influence your verdict in any way, unless you find from the proof, beyond a reasonable doubt, either that the defendant used the bank's funds dishonestly in such transactions or that he knew that the cashier was using the funds of the bank for his own personal interest or the interest of others. If you find, beyond a reasonable doubt, that the defendant did know of the unlawful use of the bank's funds by the cashier, as before indicated, that fact would not establish the defendant's guilt in this case, but would only be a circumstance to be considered by you in connection with the other evidence on the question whether defendant knew (or was charged with knowing, because he purposely abstained from knowledge) at the time of certifying the checks mentioned in the

indictment that Dobbins & Dazey did not have funds and credits on deposit in the bank sufficient to meet those checks.

The court also instructed the jury, in the general charge, among other things, as follows:

The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.

The court also instructed the jury that "the fact that the cashier had bought and sold stocks and bonds or cotton futures, and that the defendant knew the fact, would not establish or imply that he was personally dishonest nor deprive the defendant of the right to rely upon his statements in respect to the affairs of the bank, unless he also knew or had reason to believe that the cashier had been using the funds or credits of the bank instead of his own in such transactions. In order to deprive the defendant of the right to rely upon the cashier, it must be shown beyond a reasonable doubt that he knew that the cashier was unfaithful to the bank and was acting unlawfully in respect to its affairs."

The request which is made the subject of error under this assignment was fully and fairly covered by the other instructions given by the court.

NINETEENTH ASSIGNMENT.

The nineteenth assignment is that there is error in the exclusion of the evidence of John Overton

and other witnesses, offered by defendant, first, as to defendant's good character for truth and veracity; and secondly, as to defendant's good character for honesty and integrity during the whole period of his residence in Nashville.

The Government introduced all of its evidence before it rested. No witness was offered by the Government in rebuttal after defendant's witnesses were examined. The Government did not offer any evidence as to the general character or reputation of the defendant; nor did it offer any evidence as to his general reputation for veracity or honesty.

The defendant voluntarily testified as a witness in his own behalf, his direct and cross-examination both being at great length and occupying parts of three days.

After the defendant had been cross-examined by the Government in the manner set forth in the printed record, the defendant called and proposed to examine witnesses as to his good character, and his counsel asked a witness, Mr. John Overton, certain preliminary questions touching his age and residence, and the witness having stated his acquaintance with defendant for about thirty years, the following colloquy occurred:

Q. Do you know his general character and reputation in this community during that period for honesty and integrity and truth and veracity?

A. I do, sir.

Mr. BAXTER (for the Government): The Government insists that the question ought to be divided. As to his reputation for honesty and integrity, it ought to be confined to the filing of the indictments, at least to the time of the charge in this case.

Mr. PITTS (for defendant): If your honor please, we insist upon our right to put Major Spurr's character in issue, both for honesty and integrity and truth and veracity, during the entire period that he had lived in Nashville up to the time of this investigation and subsequent thereto.

The court in its ruling said :

I am quite clearly of the opinion that you are entitled to ask this witness questions showing the length of time of his acquaintance, his familiarity with the defendant, and his means of knowledge of the general character which the defendant has sustained in the community up to the time of the transactions; and then ask him what that character was, if the preceding questions have shown he is sufficiently competent to testify on that subject. With respect to the other question in the case—that is, the respondent's character for truth and veracity—I am not satisfied that you have a right to go into that question generally, unless his *character* has been attacked by the evidence on that subject.

Thereupon the examination of the witness Overton was resumed as follows:

Q. (by defendant). Now, Colonel Overton, I understand you to say you had known his general character?

A. Yes, sir.

Q. What was that general character down to the time (as the court has limited me) to this charge against him?

A. I think it was good, sir.

Q. Now, do you know what his general character in this community, up to this time, has been for truth and veracity.

(Objected to by the Government.)

The question as to the admissibility of this evidence (as to truth and veracity) was argued by counsel and taken under advisement by the court.

Other witnesses were then examined under the preliminary ruling and limitation, counsel for the defendant stating to the court that he wished to ask all of them "as to the character of defendant for truth and veracity during their entire acquaintance with him down to the present time ; also, that he wished to asked them as to his character for honesty and integrity during the same period."

On the morning succeeding the argument of the question of the admissibility of evidence as to defendant's truth and veracity, the court announced its adherence to the preliminary ruling above stated, under which the court had excluded evidence as to the defendant's character for truth and veracity, and to this ruling of the court defendant excepted. The court "based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad *character*," and that there having been no proof offered by the plaintiff, of defendant's bad *character* as a witness, no proof of his good *character* for truth and veracity could be offered by the defendant."

As a result of the ruling of the court the defendant was allowed to introduce witnesses as to his "general character down to the time of the charge against him," but he was not allowed to bring that evidence down to the date of the trial. He was not allowed to introduce any evidence as to his "character for truth and veracity."

"Evidence of good character (for peace and quiet) must be confined to the time of and anterior to the commission of the offense for which defendant is being tried."

111 Ala., 96, *White v. State*.

73 Ia., 536, *State v. Ward*.

43 Ia., 296, *State v. Kinley*.

51 Pac. Rep., 1090, *State v. Marks*.

29 Tex. App., 32, *Graham v. State*.

First. There can be no doubt as to the correctness of the court's ruling to the effect that while the defendant was entitled to introduce witnesses to show his *general character*, down to *the time of the charge against him*, he had no right to bring that evidence *down to the date of the trial*. The rule upon the subject is correctly stated by his honor as follows :

The rule which allows the defendant to offer proof of his character is based upon the presumption that a man who has a good character would not commit the offense with which he is charged, and, of course, as the inquiry is in reference to a question of fact, whether he did do that thing or not. I think the time to which the testimony should relate in regard to his good character should also have reference to that time. Now, there is a very important reason, counsel must see, if they reflect upon it, for limiting the inquiry to that time. If we were to bring the time down to the present, it would be liable to embarrass the jury and to turn their minds from the real merits of the case and put before them opinions which ought to be kept as far from the jury as possible. If we come down to the present, we would proceed to launch ourselves upon an inquiry as to what the people of the community thought of the case at present, and as to whether the defendant's reputation stood untarnished since this transaction or since his arrest.

Second. As to the ruling of the court excluding evidence of the defendant's "character for truth and veracity," it will be remembered that the Government introduced all of its testimony before the defendant was examined, and, in fact, before he offered any testimony in his behalf.

It will also be remembered that after the defendant gave his testimony, and introduced all of the other testimony that was used in his behalf, the Government offered no testimony whatever in rebuttal.

After the Government had introduced all of its testimony the defendant voluntarily went upon the stand and undertook, by his own testimony, to contradict the testimony which the Government had previously offered in the case; and because he had seen proper to voluntarily contradict the Government's testimony, he sought to bolster up his own testimony by offering certain witnesses to prove his general character for truth and veracity down to the time of the trial.

We submit that the court committed no error in excluding such testimony.

An accused man can not bolster up his own testimony by proof that he is a man of good character for truth and veracity, where no attempt has been made to impeach him, by evidence of bad character, or of statements made by him out of court contradictory of his testimony, although such testimony conflicts with that of other witnesses.

100 Ala., 36, 37; 14 Rep., 877, *Funderberg v. State*.

112 Ill., 266, 267, *Tendens v. Schumers*.

64 Vt., 609, *Stevenson v. Genning*.

25 Tex. App., 613, *Rushing v. State*.

93 Cal., 597, *People v. Cowgill*.

See also 1 Whart. Ev., § 569; 8 Pick. (Mass.), 153-154, *Russell v. Coffin*; 3 Hill (N. Y.), 313, *The People v. Hulse*; 5 Denio (N. Y.), 108-109, *Starks v. People*; 3 Selden (N. Y.), 379-380, *The People v. Gay*; 10 Conn., 13, *Rodgers v. Moore*; 4 Duer.

(N. Y.), 420, *Seonosi v. Bishop*; 30 Md., 456, *Vernon v. Tucker*; 78 Mo., 327, *State v. Thomas*; 31 Ill. App., 36, *C. A. R. v. Fisher*; 73 Iowa, 320, *State v. Archer*; 4 Gray (Mass.), 574, *Haywood v. Reed*; 15 Sou. W. Rep. (Mo.), 290, *State v. Patrick*; 9 Harris (Pa. St.), 274, *Werts v. May*; 86 Ind., 516, *Brown v. Campbell*; 71 Mo., 436, *State v. Cooper*; 65 Cal., 129, *People v. Bush*; 99 Ind., 28, *Fitzgerald v. Goff*; 38 Hun. (N. Y.), 168; 33 N. Y. S. R., 486, *Young v. Johnson*; 123 N. Y., 226, *Young v. Johnson*; 6 Gray (Mass.), 451, *Brown v. Moores*; 19 Tex. App., 319, *Ricks v. State*; 29 Barb. (N. Y.), 620; 2 Met. (Ky.), 583, *Vance v. Vance*; 25 S. W. Rep., 342, *Landa v. Obeset*.

The case of *Richmond v. Richmond* (10 Yerger, 345) is cited by counsel for defendant. That case was decided in 1837.

It appears from the report of the case, that Hamilton, (a witness) was subjected to a "searching" cross-examination by defendant's counsel, in which were many questions as to the situation of the buildings; his "motives" for being in the place where he witnessed the facts to which he deposed, etc.

The report does not set forth in full the "searching cross-examination;" nor does it set forth any of the "many questions" which were put to him; nor does it inform us as to the character of the "motives" which the cross-examination attributed to him.

It may be that the very nature of the cross-examination in that case impeached the general character of the witness for truth and veracity. But the cross-examination in this case did no such thing.

In the absence of information on the points above referred to, the report of the case fails to show satisfactorily that the precise question involved in the case at bar was decided in that case.

The court in that case announced as a proposition of law that:

A witness may be impeached—

1. By proving that he is not worthy of credit.
2. Or that the facts to which he deposes are not true.
3. Or by cross-examination, in which he may be involved in inconsistencies.

See 10 Yerger, page 345.

As to the second case put by the court; viz, that a witness may be "*impeached*" by proving that the facts to which he deposes are not true; it seems to us to ignore the correct meaning of the word "*impeach*."

To "*impeach*" means to challenge or discredit the "*credibility*" of a witness. (See Webster's Unabridged; Rapalje's Law Dictionary.)

Though a witness may be contradicted in the most direct and positive manner; and though it may be the intention of counsel to insist that his testimony is untrue, it does not "*impeach*" his *character* for "*credibility*." For a witness of the highest character for "*credibility*" may testify to a fact of the utmost importance, and yet the fact testified to by him may be absolutely false.

If the supreme court of Tennessee intended to hold that wherever a witness is contradicted evidence of his good character for veracity may be introduced to sustain it, then where twenty witnesses on one side contradict twenty witnesses on the other side (as is frequently the

case in admiralty suits, and suits involving the identity of persons or animals), witnesses to sustain the reputation for veracity of each of the witnesses contradicted may be introduced, and the jury may be diverted from the consideration of the real question submitted to them into a collateral inquiry as to the reputation of the witnesses in the case.

The case of *Richmond v. Richmond*, though decided in 1837, has never been reaffirmed or ever referred to, by the Supreme Court on the point now in controversy.

But if that case had decided the point as contended for by counsel for defendant, and if it had been reaffirmed by the supreme court of the State, it would not be controlling in this court.

The Tennessee statute permitting a defendant to testify was approved March 14, 1887. (See Acts of Tennessee, 1887, p. 158.)

The only reported cases decided on the statute are:

- 2 Pickle, 259, *Peck v. State*.
- 5 Pickle, 232, *Staples v. State*.
- 7 Pickle, 725, *Richards v. State*.
- 7 Pickle, 619, *King v. State*.
- 7 Pickle, 522, *Hilt v. State*.
- 8 Pickle, 283, *Clemons v. State*.
- 10 Pickle, 201, *Clapp v. State*.
- 10 Pickle, 496, *Lea v. State*.

The only one of those cases that can be claimed to have any bearing on the question now under consideration, is the case last cited, viz, *Lea v. State*.

In the case of *Lea v. State* (10 Pickle, 496) the defendant, after testifying in his own behalf, introduced three witnesses as to his general character.

only quoted part of this instruction. The entire instruction is as follows:

Evidence has been offered to prove Dobbins & Dazey to have been heavily overdrawn for some time when some of these checks were verified by the defendant and that this fact was and for some time had been a matter of common knowledge among the employees of the bank; and further, that it was not customary for checks to be sent to the president for certification when there were funds in the bank belonging to the drawer sufficient to cover the check, and there is other evidence, which, if believed, tends to show express knowledge on the part of the defendant of the state of the account; nevertheless, he testifies that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing their account to be overdrawn or that there was too small a sum to their credit to meet them.

Gentlemen, do you think this is true? It is for you to say, and as you are responsible for your answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question; not only that I have referred to, but all else that reflects light upon it. If you believe this statement of the defendant to be true, there is an end of the case and the defendant should be acquitted; and the same result should follow if you are not satisfied beyond a reasonable doubt that the contrary is a fact.

In determining these questions you are to look to all the evidence bearing upon his knowledge and give all its just effect. You are not restricted to the direct evidence of the facts. The moral probabil-

A witness impeached by disproving the truth of his evidence, but not otherwise, can not be sustained by evidence of his good character.

93 Ga., 481, *Miller v. W. and N. R. R.*

5 Ind. App., 252, 253, *Diffenderfer v. State.*

21 Ind., 16, *Pruitt v. Cox.*

77 Ind., 280, *Presser v. State.*

13 Wash., 524, *State v. Nelson.*

9 Watts (Penn.), 124, *Braddie v. Brownfield.*

ities flowing from conceded facts or which are proven to your satisfaction should also be considered, and such probabilities may furnish ground for believing that that which they indicate is the truth.

Counsel do not complain that this instruction is error, but they only complain of it in connection with the contention that the court should have permitted the defendant to introduce evidence as to his general reputation or character for truth or veracity, placing their contention upon the ground that this particular instruction was an attack by the court upon the defendant's testimony.

The court will notice that this instruction, while it comments upon the testimony of the defendant, is not confined to that alone, but calls attention to all the facts and circumstances proven in the case, and specifically instructs the jury that all these facts and circumstances are to be considered in connection with the testimony of the defendant in determining the issues in this case.

The contention of counsel is that this instruction was an assault upon the testimony of the defendant. There is no question but what the court has the right to comment upon in any part of the testimony given in the case provided the jury are fully instructed that, notwithstanding such comments, they are to find the ultimate fact. This was done in this case.

The ruling of the trial court was that evidence of general reputation or character for truth and veracity could not be introduced in this case because the *reputation* and *character* of the defendant for truth and veracity had not been attacked. There is a vast difference between an attack upon particular testimony given in a case and an

attack upon the character and reputation of the witness who testifies.

If it were proper to introduce evidence of a general good reputation for truth and veracity in every case where the testimony given by a witness is commented upon and attacked by counsel in argument, it would mean a general rule that evidence of a general good reputation for truth and veracity of every witness who testifies could be introduced in *every* case. There are few cases tried in the *nisi prius* courts of the United States or States where the testimony of witnesses is not commented upon, and in a measure, attacked by counsel in the presentation of the case.

TWENTIETH ASSIGNMENT.

The twentieth assignment is, that there is error "in the action of the court in overruling defendant's motion for arrest of judgment for uncertainty and insufficiency of the verdict of the jury." (See printed transcript.)

The minute entry, which shows the form of the verdict, was as follows:

Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment and recommend him to the mercy of the court. (See printed record.)

The sentence of the court that was pronounced upon the verdict was as follows:

And thereupon the United States, by its district attorney, moved the court for sentence upon the

verdict of the jury heretofore rendered, upon count No. 2 of indictment No. 7994; count No. 2 of indictment No. 8139; counts Nos. 1 and 4 of indictment No. 7994; count No. 3 of indictment No. 8139; count No. 2 of indictment No. 8078; and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand, and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being cognizant of the facts attending said verdict, and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges, that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York at Albany, New York, for two years and six months from this date.

Defendant's counsel in their brief submit this question without argument. We quote some authorities relative to the degree of certainty that is required in verdict and to the power of courts to mould verdicts.

DEGREE OF CERTAINTY REQUIRED IN VERDICT.

Certainty to a common intent is sufficient. (2 Wheaton (309), *Liter v. Green*.)

It is the lowest degree known to the rules of pleading. (Gould Plead., p. 73.)

Any words which convey the idea to the common understanding are adequate. (157 U. S., 279, *Statler v. United States*.)

Being "*the finding of lay people*," it need not be framed under the strict rules of pleading, or after any technical form. (157 U. S., 279, *Statler v. United States*.)

All fair intendments will be made to support it. (157 U. S., 279, *Statler v. United States*; 154 U. S., 154, *St. Clair v. United States*.)

Though expressed in bad English, it is sufficient, if it clearly manifest the intention of the jury. (112 U. S., 217, *Snyder v. United States*.)

POWER OF COURT TO MOULD A VERDICT.

If a verdict find the *substance*, the court will mould it into *form*. (Brightly Fed. Dig., p. 675, § 462.)

The substance of this verdict is the finding of "*guilty*." (37 Ill., 462, *Armstrong v. People*.)

HOW A VERDICT MAY BE AIDED.

All parts of the record must be interpreted together, supplying a deficiency in one part, by what appears elsewhere in the record. (154 U. S., 154, *St. Clair v. United States*; 151 U. S., 419, *Pointer v. United States*.)

The indictment may be referred to. In one case the verdict was "*guilty of shooting, not in his own defense*." As the indictment was for manslaughter, judgment was entered *as if the jury had added "without justification"*. (51 Ga., 146, *Arnold v. State*.) In another case Green Martin was indicted with a third person, but Martin

alone was tried. The verdict was: "We find the defendant guilty." Judgment was rendered as if Martin's name had been mentioned in the verdict. (25 Ga., 502, 503, 512, *Martin v. State*.)

The evidence may be referred to.

The *evidence and the pleadings* may be used. (12 How., p. 45, *Parks v. Turner*, cited in 112 U. S., p. 217, *Snyder v. United States* (which is a criminal case).)

In a certain case, two felonies, requiring different punishments, were charged in different counts, and a general verdict was rendered. Held: that the court could see, *from the facts*, upon which count to render judgment. (34 Conn., p. 299, *State v. Tuller*.)

The charge or instructions may be referred to.

In a certain case the jury found for defendant, but failed to find a fact which the court instructed them to find if they found for defendant. (96 U. S., p. 626, *Gregory v. Morris*.)

THE VERDICT IN THIS CASE.

"We, the jury, find the defendant guilty (on the three last certified checks, and recommend him to the mercy of the court)."

The words *italicized* constitute a general verdict of guilty on all the counts. (160 U. S., 197, *Ballew v. United States*; 157 U. S., 279, *Statler v. United States*.)

The words in parentheses are "superfluous," and striking them from the verdict, leaves it in all respects complete and responsive to the charge. (157 U. S., 279, *Statler v. United States*.)

The words "as charged in the indictment" would have been supplied by construction. (157 U. S., 279, *Stallor v. United States*; 154 U. S., 154, *St. Clair v. United States*.)

The words in parentheses, while *superfluous in law*, are suggestive or advisory, to the court, as to the punishment.

ANOTHER VIEW OF THE VERDICT.

"Guilty on the three last certified checks," means guilty on the counts which are based on the three checks that were "last certified," and upon which evidence was offered.

The three checks that were "last certified," and upon which evidence was offered, were—

| | |
|---|-------------|
| Check dated December 17, 1892, for..... | \$31,000.00 |
| Check dated January 3, 1893, for..... | 40,000.00 |
| Check dated February 13, 1893, for..... | 9,641.95 |

The following counts were based on those checks, respectively :

| | | |
|----------------------------|---|----------------------------|
| Indictment 7994, count 2.. | } | Based on check of Dec. 17. |
| Indictment 8139, count 2.. | | |
| Indictment 7994, counts 1 | } | Based on check of Jan. 3. |
| and 4 | | |
| Indictment 8139, count 3.. | } | Based on check of Feb. 13. |
| Indictment 8078, count 2.. | | |
| Indictment 8139, count 5.. | } | |
| | | |

See the indictments in the unprinted part of the record.

As the jury did not have the indictments, it was impossible for them to specify the counts which were based on those three checks.

The court, in the charge to the jury, said :

"The specific charges upon which the defendant is now being tried *are the certification of the following checks,*" etc. They were then described in the order of their dates.

The court also sent the checks to the jury.

With the checks before them, and under the charge, the jury said "guilty on the three last certified checks."

The jury did not mean to say "guilty *on the checks,*" for that is absurd.

Their language is to be aided by all fair intendment. It is sufficient, if it convey the idea to the common understanding. Though expressed in bad English, it is sufficient if it manifests their intention. It was not necessary for it to be framed in technical form, nor under the strict rules of pleading. The very lowest degree of certainty will do.

The jury did not mean guilty on the three checks *that were last described in the indictment*; because they did not have the indictments, and could not know which there were "*last described.*"

CHECK OF JANUARY 3, 1893.

It was one of the three checks that were "last certified."

It was described in the last count of indictment No. 7994, and in one of the three last counts of indictment No. 8139.

It answers equally well :

One of the "last three certified checks."

And one of the "last three certified checks (described) in the indictment."

Taking the instructions of the trial judge as given to the jury, they in substance told the jury that if they believed from the evidence that the defendant certified the checks described in the indictment, and that at the time he so certified them Dobbins & Dazey had no money on deposit in the Commercial National Bank with which to pay said checks, and that the defendant knew when he certified the checks of the condition of the account of Dobbins & Dazey, and that the defendant *willfully, designedly, and in bad faith* certified the checks, that in such case, the defendant was guilty.

These instructions were correct.

There was ample evidence for the jury to find that the defendant certified the checks; that when he certified them Dobbins & Dazey, who drew the checks, had no money on deposit in the Commercial National Bank to pay them; that the defendant, when he certified the checks, knew of the condition of Dobbins & Dazey's account, and knew it was overdrawn; that in the affirmative act of certifying the checks he acted willfully, designedly, and in bad faith.

The defendant has had a fair trial. The instructions of the court, taken as a whole, fairly instructed the jury as to the law governing the case. The defendant is guilty. The judgment of the trial court and of the circuit court of appeals should be affirmed.

Respectfully submitted.

JOHN G. THOMPSON,
Assistant Attorney-General.

ED. BAXTER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

| | |
|------------------------------|------------|
| MARCUS A. SPURR, PETITIONER, | } No. 448. |
| <i>v.</i> | |
| THE UNITED STATES. | |

SUPPLEMENTAL BRIEF AND ARGUMENT FOR THE UNITED STATES.

I.

Petitioners's counsel, on page 55,^r of their brief, quote the following sentence from the charge:

It was the defendant's duty, before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn.

We do not understand counsel to controvert the proposition contained in that sentence.

On the contrary, they concede it.

On page 70 of their brief, they say :

Now, we do not insist that it was not the duty of defendant to inform himself of the condition of the accounts ; we concede that it was his duty to do so, etc.

And on page 77 of their brief they say:

We have granted that it was the defendant's duty, growing out of his relationship to the bank as president, to inform himself whether sufficient funds were in the bank before certifying the checks, etc.

If this court should hold that it was not the duty of a bank officer to inform himself of the condition of an account before certifying a check, any such bank officer could shield himself from all criminal responsibility by merely abstaining from inquiry in regard to a fact the truth of which he assumed to certify.

II.

Petitioner's counsel, on page 55 of their brief, quote the following sentence from the charge:

From the existence of such a duty you *may draw an inference of fact* that he did so inform himself, if he did not already know it;"

The court did not tell the jury that it was a presumption of law. The court merely told them that they "may draw an inference of fact." The court did not tell the jury that they *were bound* to draw even an inference of fact. All that the court said was that they "*may*" do so.

A "presumption of law means" that where certain facts are proven, the law presumes the existence of a certain other fact.

A presumption of law may be conclusive; and in such a case no testimony will be admitted to contradict it.

The presumption of law that an infant under 7 years of age is incapable of committing a felony is conclusive; and no testimony will be admitted to contradict it.

(Clark's Criminal Law, p. 49, § 26; 4 Blackstone Com., p. (22).)

Or, a presumption of law may be disputable; and in that case the presumption may be contradicted by testimony.

The presumption of law that an infant over 14 years of age is capable of committing a felony is disputable; and it may be contradicted by testimony showing that the particular infant in question was, in fact, incapable of committing the crime charged against him.

But the burden is upon the defendant in such a case, to show affirmatively that he was incapable of committing the felony charged against him. (Clark's Criminal Law, p. 49, § 26.)

Whether a presumption of *law* be conclusive, or disputable, it is created by the *law*, and the jury are *bound* to act upon it, whether they believe it to be reasonable or unreasonable.

On the other hand, an "inference of *fact*" is at best a mere argument. (Lawson on Presumptive Ev., p. 356.)

The law takes no cognizance whatever of a mere inference of fact; and the jury are left perfectly free to adopt or reject it, as it may appear to their minds to be reasonable, or not.

And so the court in this case told the jury, not that they must, but that they "may" draw a certain "inference of fact."

III.

Petitioner's counsel, on page 77 of their brief, cite the case of *United States v. Ross* (92 U. S., 281), for the

proposition that "even the presumption that public officers have done their duty does not supply proof of independent and substantive facts."

In that case this court, in reversing the action of the Court of Claims, said :

Certain facts have been found, and from them it was inferred as matter of *law* that other facts existed ; and upon the facts thus inferred the court gave judgment. We think in this there was error. (92 U. S., 282.)

Again : After stating the facts that were found in that case by the Court of Claims, this court said :

Such were the facts found, and from them the court deduced *not* as a conclusion of *fact*, but as a presumption of *law*, that the 31 bales removed on Government wagons to the warehouse immediately adjoining the railroad at Rome shortly after May 18, 1864, were a part of the 42 bales received at Nashville on the 24th of August, four months afterwards, and there turned over to the Treasury agent. (92 U. S., p. 283.)

In that case the Court of Claims gave to a certain deduction all the potency of a presumption of *law* ; while in this case the court merely told the jury that they might, if they saw proper, draw a certain inference of *fact*.

The correct rule upon the subject is thus stated by this court :

Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. (92 U. S., p. 284.)

But where the circumstances are themselves proved, the jury may or may not deduce from them, as an inference of fact, the existence of the ultimate fact to be proved; for if it were not so, circumstantial evidence could not be used at all.

The only reason why circumstantial evidence is ever resorted to, is because direct evidence of the ultimate fact to be proved in the particular case can not be obtained.

In the Ross Case, the ultimate fact to be proved was that the proceeds of complainant's cotton were paid into the Treasury of the United States; and complainant was forced to rely upon circumstantial evidence to prove it.

(1) He proved that in May, 1864, he owned 31 bales of cotton, then in a warehouse in Rome, Ga.

(2) He proved that on the 18th of that month Rome was captured by the United States forces.

(3) He proved that shortly afterwards said cotton was removed on Government wagons to another warehouse adjoining the railroad leading from Rome to Kingston, and connecting there with a road leading thence to Chattanooga.

But whether complainant's cotton was the only cotton in that warehouse was not found, and it was inferable from the other facts that it was not.

(4) He proved that subsequently (but how long afterwards did not appear) all of the cotton *then* in that warehouse was shipped on the railroad to Kingston, the road being then in the possession of the military authorities. But it was not shown that complainant's cotton was still in that warehouse when said shipment was made.

(5) He proved that some cotton arrived in Kingston from Rome before August 19, 1864, and was forwarded to Chattanooga. But it was not shown that complainant's cotton was a part either of the cotton that was forwarded from Rome to Kingston, or of the cotton that was forwarded from Kingston to Chattanooga.

(6) He proved that on August 19, 42 bales of cotton were received at Chattanooga from the quartermaster at Kingston. But it was not shown that complainant's cotton was part of the cotton that was received at Chattanooga.

(7) He proved that the 42 bales received at Chattanooga were shipped to Nashville, where they were received as coming from Kingston; that they were turned over to the Treasury agent, and that they were sold. But it was not shown that complainant's cotton was part of the cotton that was sold at Nashville.

In a word, complainant utterly failed to prove five out of seven of the "circumstances" upon which he relied to prove the ultimate fact, viz, that the proceeds of *his* cotton were paid into the Treasury of the United States.

Suppose, however, that complainant had succeeded in proving:

(1) That he owned 31 bales of cotton in a certain warehouse in Rome in May, 1864.

(2) That on May 18 Rome was captured by the Government forces.

(3) That *his* cotton (not merely some cotton) was removed in Government wagons to a warehouse adjoining the railroad, which was then in the Government's possession.

(4) That afterwards *his* cotton (not merely some cotton) was carried over said military railroad to the quartermaster at Kingston.

(5) That *his* cotton (not merely some cotton) was forwarded by said quartermaster to Chattanooga.

(6) That *his* cotton (not merely some cotton) was shipped from Chattanooga to Nashville, and there turned over to the Treasury agent, by whom it was sold.

There is nothing in the opinion in the Ross case which even intimates that the Court of Claims could not infer as a matter of *fact* that the Treasury agent did his duty, and paid the proceeds into the Treasury.

On the contrary, this court fully recognized in that case the rule that "officers are presumed to have done their duty." (92 U. S., 284.)

There is nothing in the opinion of the court in that case overruling the case of *United States v. Crussell* (14 Wall., 4), which was decided on the presumption that officers of the Government perform their duty.

IV.

Petitioner's counsel, on page 81 of their brief, quote the following sentence from the opinion of this court, in the case of *Lilienthal's Tobacco v. United States* (97 U. S., 266):

In criminal cases the true rule is that the burden of proof *never shifts*; that in all cases, before a conviction can be had, the jury must be satisfied, from the evidence, beyond a reasonable doubt, *of the affirmative of the issue* presented in the accusation, *that the defendant is guilty* in the manner and form as charged in the indictment.

The Lilienthal Case refers to the case of the *Commonwealth v. McKie* (1 Gray, p. 64), which latter case explains what is meant by the expression that in criminal cases "the burden of proof never shifts."

The explanation is, that in an indictment for an assault and battery, the State must prove, not only that the battery was committed, but also that there was no legal justification for it; while in a civil action of trespass for the same assault and battery, if the plaintiff proves the assault and battery, the burden is shifted to the defendant to prove self-defense. (See 1 Gray, pp. 64, 65.)

In a criminal case justification or the absence of it, may be shown under the general issue; and as the burden of proof on the general issue in a criminal case is on the State throughout, of course it never shifts to the defendant.

In a civil action of trespass neither justification nor the absence of it can be shown under the general issue. In such an action justification must be specially pleaded. And when pleaded, it admits the trespass and assumes the burden of justifying it.

As said by this court in the Lilienthal Case, "*the affirmative of the issue presented in the accusation*" in a criminal case is "*that the defendant is guilty in the manner and form as charged in the indictment.*"

The *ultimate* fact to be established by the State is "that the defendant is guilty;" and the burden of proving that *ultimate* fact "never shifts" from the State to the defendant.

But in most criminal cases the *ultimate* fact of guilt can be proven only by a resort to circumstantial evidence.

Circumstantial evidence consists of certain *probative* facts, the proof of which establishes the *ultimate* fact of guilt.

While the burden of proof never shifts as to the *ultimate* fact of guilt, it frequently shifts as to the *probative* facts relied upon to establish the *ultimate* fact.

To hold that the burden of proof never shifts as to the *probative* facts in a criminal case would be to hold that *circumstantial evidence can not be used at all in criminal cases.*

In an indictment for murder the *ultimate* fact to be proved by the State is that the defendant is guilty of that offense.

In order to constitute murder, the homicide must have been done with malice; and therefore malice is one of the *probative* facts to be established in the case.

The State proves that the homicide was voluntary and without excuse or justification. The law presumes the existence of the *probative* fact of malice; and the burden is shifted to the defendant to show the want of malice. (9 Metcalf (Mass.), 121, *Commonwealth v. York.*)

Another illustration of the shifting of the burden of proof as to the *probative* facts in criminal cases is given in Reynolds's Stephens on Evidence, third edition, article 95, page 142.

A., a married woman, is accused of theft and pleads not guilty. The burden of proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden

of proving that she was not coerced by him is shifted on the prosecutor.

It will be seen that when it is said that the burden of proof never shifts in criminal cases, all that is meant is that the burden of proving the *ultimate* fact of *guilt* does not shift, but remains on the Government throughout. But as to the proof of the various *probative* facts which it may be necessary for the Government to establish in any particular case, the Government may establish each and all of them by proof of certain circumstances; and when such circumstances are proven, the jury may draw from them inferences of fact as to the existence or nonexistence of the particular *probative* fact to which they relate. Nothing said by this court in the Lilienthal case was intended to abolish the use of circumstantial evidence in criminal cases.

In the case at bar the *ultimate* fact to be proven by the Government was *that the defendant is guilty* in the manner and form as charged in the indictment; and as to that *ultimate* fact the burden never shifted.

But one of the *probative* facts to be established was that defendant had knowledge of the state of the account.

The Government proved that the defendant was president of the bank and certified the checks voluntarily. The court told the jury that it was the defendant's duty, before certifying the checks, to inform himself of the state of the account, and from the existence of such a duty the jury might draw an inference of fact that he did so inform himself. In other words, the court said that the jury might infer the *probative* fact of *knowledge* from

the defendant's duty to know ; but it did not say that the jury might infer the *ultimate* fact of *guilt*.

Counsel for petitioner, on page 81 of their brief, quote this sentence from the opinion of the court in *Agnew v. United States* (165 U. S., pp. 49-50):

Undoubtedly, in criminal cases the burden of *establishing guilt* rests on the prosecution from the beginning to the end of the trial.

But counsel failed to quote the next succeeding sentence in the opinion, which is as follows:

But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, *the necessity of adducing evidence then devolves on the accused.* (165 U. S., p. 50.)

V.

Petitioner's counsel, on page 74 of their brief, say :

It does not seem to have occurred to the court that it was as much the legal duty of defendant not to certify a check when funds were wanting as it was to know the funds were on hand when he did certify ; and *the novel process of presuming the performance of one duty to convict a man of crime in the violation of another does not seem to have attracted its notice.*

Again, on page 79 of their brief, they say :

Is it to be inferred or presumed that the defendant performed his duty under the by-laws of the bank in order to predicate the conclusion that he violated his duty under a statute of the United States and committed an infamous crime, etc.?

Their contention is, in effect, that defendant was deprived of the benefit of a presumption of law which

obtained in his favor, while he was subjected to a presumption of fact which obtained against him; whereas the one presumption ought to have neutralized and nullified the other.

We concede that the defendant was fully entitled to the benefit of the presumption that he did his duty "not to certify a check when funds were wanting," but we contend that he received the full benefit of that presumption in the following portion of the charge of the court to the jury, which was given at defendants request:

The *law* presumes the defendant to be innocent, and this presumption stands as an all-sufficient witness in his favor, until the Government establishes his guilt by competent proof to your satisfaction beyond a reasonable doubt. (See printed record, p. 124.)

As to the other presumption, or inference, viz, that defendant discharged his duty in regard to informing himself as to the condition of the account before certifying the checks, the court merely told the jury that they might, if they saw proper, draw an inference of fact that he did so inform himself, but that the defendant might show (i. e., by a mere preponderance of proof) that he did not in fact acquire information of the truth. It will be seen that so far as the presumption in favor of the defendant was concerned, it was given all the potency of a presumption of *law*; while as to the presumption or inference in favor of the Government, with reference to the *probative* fact of knowledge, it was left discretionary with the jury whether they would give it even the potency of an "inference of fact," i. e., of a mere argument.

It will also be seen that while the Government was required to overturn the presumption in favor of the defendant by proof beyond a reasonable doubt, the defendant was allowed to overturn the inference of fact (if the jury saw proper to draw it) by a mere preponderance of testimony.

VI.

Petitioner's counsel, on page 79 of their brief, use this language:

It is a rule of law, and of common sense as well, that opposing presumptions, like opposing estoppels, *neutralize and nullify each other and leave the matter at large.* (*Ricard v. Williams*, 7 Wheat., 59.)

By reference to the case of *Ricard v. Williams* it will be seen that this court did *not* say that "opposing presumptions neutralize and nullify each other and leave the matter at large." On the contrary, the court said that presumptions "may be encountered and rebutted by contrary presumptions." (See 7 Wheat., p. 109.)

In the case at bar, the court gave the defendant the full benefit of the presumption that he did not "willfully certify a check when funds were wanting;" and all the court did was to allow the presumption to be "encountered and rebutted," so far as the *probative* fact of knowledge was concerned by the contrary inference of fact "that he did his duty and informed himself of the state of the account." The court allowed the inference to operate only toward the establishment of the *probative* fact of knowledge.

The court still left upon the Government the burden of proving the "bad intent," which is the other essential of "willful."

VII.

Counsel for petitioner, on pages 13, 14 of their brief, refer to certain cases in 20 Vt., 21 Vt., and 12 Vt., on the question as to the defendant's right to introduce evidence in support of his character.

In the case of *Stephenson v. Gunning* (64 Vt., 609) the earlier Vermont cases are reviewed, and the practice as followed by the trial court in the case at bar is approved.

Respectfully submitted.

JOHN G. THOMPSON,
Assistant Attorney-General.

ED. BAXTER,
Of Counsel.

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Syllabus.

SPURR v. UNITED STATES.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 448. Argued March 13, 14, 1899. — Decided May 22, 1899.

Spurr was tried in the Circuit Court of the United States for the Middle District of Tennessee on three indictments, consolidated together, each of which charged him with having wilfully violated the provisions of Rev. Stat. § 5208, by wilfully, unlawfully and knowingly certifying certain cheques drawn on said bank by Dobbins and Dazey, well knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the cheques were certified, respectively, an amount of money equal to the respective amounts specified therein. It was not denied that the defendant certified the cheques, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the cheques were certified and his intent in the certifications. After the case had been committed to the jury, and they had had it under consideration for some hours, they returned to the court room, and asked the following question, which was written out: "We want the law as to the certification of cheques, when no money appeared to the credit of the drawer." The court read to the jury the first half of Rev. Stat. § 5208, as follows: "It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque." The court then inquired: "Does this answer your question?" To which the foreman replied: "Yes, sir." The court again read that part of the section, and made certain observations; among others that a false certification was "the certifying by an officer of the bank that a cheque is good when there are no funds to meet it." As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 which the court had read to them, and that the court ought to read and explain that act to the jury. That act provided that an officer, clerk or agent of a national bank wilfully violating the provisions of Rev. Stat. § 5208, etc., "should be deemed guilty of a misdemeanor, and should, on conviction," "be fined," etc. The court, after asking if the counsel referred to the act prescribing a penalty for false certification, and receiving an answer in the affirmative, said that the jury had nothing to do with that. *Held*, that the Circuit Court clearly erred in declining the request of counsel in respect of the act of 1882.

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SPURR was tried in the Circuit Court of the United States for the Middle District of Tennessee on three indictments, each containing several counts, for the violation of section 5208 of the Revised Statutes, which provides:

"It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque. Any cheque so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

By section 13 of the act of Congress approved July 12, 1882, c. 290, 22 Stat. 162, it is provided:

"That any officer, clerk or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying cheques by national banks,' approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any Circuit or District Court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court."

The indictments charged that Spurr, being the president of the Commercial National Bank of Nashville, Tennessee, wilfully violated the provisions of section 5208 of the Revised Statutes by wilfully, unlawfully and knowingly certifying certain cheques drawn on said bank by Dobbins and Dazey, well

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knowing that Dobbins and Dazey did not have on deposit with the bank at the times when the cheques were certified, respectively, an amount of money equal to the respective amounts specified therein. They were consolidated and tried together, and a verdict of guilty returned as follows: "Came the United States attorney, and also the defendant in proper person, and came also the jury heretofore impanelled, and upon their oaths do say that they find the defendant guilty as charged in the indictment and recommend him to the mercy of the court."

Motions for new trial and in arrest of judgment were made and overruled, and judgment entered on the verdict in these words:

"And thereupon, the United States, by its District Attorney, moved the court for sentence upon the verdict of the jury heretofore rendered, upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, counts Nos. 1 and 4 of indictment No. 7994, count No. 3 of indictment No. 8139, count No. 2 of indictment 8078 and count No. 5 of indictment No. 8139. The defendant was thereupon called upon by the court to stand and was asked by the court if he had anything further to say why the sentence of the law should not be pronounced against him, and he replied that he had nothing further to say than he had already said; and the court, being cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a cheque certified by the defendant, dated January 3, 1893, and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined to the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date."

The several counts of the consolidated indictments charged the certification by defendant of four cheques drawn by Dobbins and Dazey between December 9, 1892, and February 13, 1893, both inclusive, on the Commercial National Bank, aggregating \$95,641.95. The bank was organized in 1884, and

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defendant was its president and one Porterfield its cashier from its organization to its failure, March 25, 1893. Dobbins and Dazey were engaged in the purchase, sale and exportation of cotton, and their financial standing and credit were excellent. When the four cheques in question were certified by defendant the accounts of Dobbins and Dazey were overdrawn, and the evidence was that their account was continuously and largely overdrawn during the period covered by these cheques, except on one day, and that "this fact was known to Porterfield, the cashier, and all the employés of the bank under him in authority." But "there was also evidence tending to show that Porterfield misrepresented the real state of the Dobbins and Dazey account to the defendant and the committees and the directors of the bank, by statements made to them, and also in his sworn reports to the Comptroller of the Currency, wherein the overdrafts in the bank were very largely understated." There was also evidence on behalf of defendant to the effect "that he had no knowledge of the fact that the account of Dobbins and Dazey was overdrawn on the books of the bank at the time of the certification of any of the cheques upon which he is indicted, nor at any time during the period covered by the dates of the cheques;" that when he certified these cheques he inquired in every instance either of the cashier, or of the exchange clerk, and in every instance received information that sufficient funds and credits of Dobbins and Dazey were then in the bank to cover the cheques certified, and that he never at any time certified a cheque without receiving such information, and that he relied upon it as true; that if the cashier was in, he inquired of him; if not, he inquired of the exchange clerk; these being the appropriate sources of information. The evidence on this head is given in much detail in the bill of exceptions.

The bill of exceptions also stated —

"After the jury were charged and had retired from the court room to consider their verdict, and had been deliberating for some hours, they returned to the court room and asked the following question, which was written out in pencil and handed to the court :

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"We want the law as to the certification of cheques when no money appeared to the credit of the drawer."

"The court then said: 'The jury state that they want the law as to the certification of a cheque where there is no money to the credit of the drawer.'

"I cannot better answer this question which the jury has put to the court, than by reading the section of the Revised Statutes which relates to that subject."

"(Reads from sec. 5208, Rev. Stat.): 'It shall be unlawful for any officer, clerk or agent of any national banking association to certify any cheque drawn upon the association unless the person or company drawing the cheque has on deposit with the association, at the time such cheque is certified, an amount of money equal to the amount specified in such cheque.'

"Does this answer your question?"

"FOREMAN OF THE JURY: 'Yes, sir.'

"THE COURT: 'I read it again so that you may all understand it.' (The court read again that part of section 5208, Rev. Stat., quoted above, and added:)

"Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the court understands from the testimony in the case, were in excess of that. The account of Dobbins and Dazey—the overdrafts—were in excess of the amount which Dobbins and Dazey had as a limit of line of credit.

"I charge you in addition to the instructions I gave you this morning, that a cheque drawn upon a bank, where the drawer has no funds, creates no obligation against the bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the cheque good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the cheque, as against the *bona fide* holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a cheque is good when there are no funds there to meet it.

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"'You understand what I have said now is to be taken in connection with what I have before instructed you.'

"As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that.

"To this action of the court in reading twice section 5208 of the Revised Statutes and in failing to read and explain the act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time beginning with the words 'The \$30,000' and ending with the words 'to meet it,' the defendant then and there excepted."

Sentence having been pronounced as before stated, the case was taken on error to the Circuit Court of Appeals for the Sixth Circuit, and the judgment was affirmed, 59 U. S. App. 663, whereupon the cause was brought to this court on certiorari.

Mr. John A. Pitts and Mr. Albert H. Horton for Spurr.
Mr. Bailey P. Waggener was on their brief.

Mr. Edward Baxter for the United States.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

It was not denied that defendant certified the cheques, and that the account of Dobbins and Dazey was overdrawn when the certifications took place. The questions for determination were defendant's knowledge of the state of Dobbins and Dazey's account when the cheques were certified and his intent in the certifications.

Section 5208 made it unlawful for any officer, clerk or agent

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of any national banking association to certify any cheque drawn upon it, unless the drawer of the check had on deposit at the time such cheque was certified an amount of money equal to the amount specified therein, and provided the consequences which should follow on a violation of the section. Then came section 13 of the act of July 12, 1882, which made a wilful violation of section 5208 criminal, and denounced a penalty thereon.

These sections were under consideration in *Potter v. United States*, 155 U. S. 438, 445, and the court said :

"The charge is of a wilful violation. That is the language of the statute. Section 5208 of the Revised Statutes makes it unlawful for any officer of a national bank to certify a cheque unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the act of 1882 imposes the penalty, and imposes it upon one 'who shall wilfully violate,' etc., as well as upon one 'who shall resort to any device,' etc., 'to evade the provisions of the act;' 'or who shall certify cheques before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association.' The word 'wilful' is omitted from the description of offences in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'wilful' in criminal statutes has been considered by this court. In *Felton v. United States*, 96 U. S. 699, 702, it was said: 'Doing or omitting to do a thing knowingly and wilfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word 'wilfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose.' 20 Pick. (Mass.) 220. 'It is frequently un-

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derstood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Crim. Law, vol. 1, § 428.

"And later, in the case of *Evans v. United States*, 153 U. S. 584, 594, there was this reference to the words 'wilfully misapplied': 'In fact, the gravamen of the offence consists in the evil design with which the misapplication is made, and a count which should omit the words 'wilfully,' etc., and 'with intent to defraud,' would be clearly bad.' . . .

"While it is true that care must be taken not to weaken the wholesome provisions of the statutes designed to protect depositors and stockholders against the wrongdoings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with the utmost honesty and in a sincere belief that no wrong was being done, criminal offences, and subjecting them to the severe punishments which may be imposed under those statutes."

The wrongful intent is the essence of the crime. If an officer certifies a cheque with the intent that the drawer shall obtain so much money out of the bank when he has none there, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself in ignorance of whether the drawer has money in the bank or not, or is grossly indifferent to his duty in respect to the ascertainment of that fact.

The defence was that defendant had no actual knowledge that Dobbins and Dazey had not sufficient funds in the bank to meet the cheques, nor knowledge of facts putting him on inquiry; that, on the contrary, he believed that they had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance before he certified; that he honestly relied on that information, and that he had the right to do so. Defendant was entitled to the full benefit of this defence, and in order to that, it was vital that the meaning of "wilful violation," as used in section 13 of the act of 1882, should be clearly explained to the jury.

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It appears from this record that after the case had been committed to the jury, and they had had it under consideration for some hours, they returned to the court room, and asked the following question, which was written out: "We want the law as to the certification of cheques when no money appeared to the credit of the drawer." The court then read to the jury the first part of section 5208 of the Revised Statutes, and inquired: "Does this answer your question?" To which the foreman replied: "Yes, sir." The court again read that part of the section, and made certain observations, among other things, that a false certification "is the certifying by an officer of a bank that a cheque is good when there are no funds to meet it."

The record shows that then "as the jury were retiring, counsel for the defendant said to the court that he thought what the jury wanted was the act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the court had read to them, and that the court ought to read and explain that act to the jury; the court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that." Exception was taken to the reading twice of the part of section 5208, and the failure to read and explain the act of 1882, and to the additional instructions given by the court.

We think that the learned Circuit Judge clearly erred in declining the request of counsel in respect of section 13.

It is true that it was not part of the function of the jury to fix the penalty, and the remark of the court, "that the jury had nothing to do with that," undoubtedly referred to the penalty only, though, as the matter appears in the record, the jury may well enough have understood it differently. But it was the act of 1882 that made the certification of cheques, if in "wilful violation" of section 5208, a criminal offence, and the word "wilful" "implies on the part of the officer knowledge and a purpose to do wrong," and plainly it was in relation to the point of "wilful violation" that counsel wished the court to read and expound that section. It seems to us that it

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was the duty of the court to do so, if the question put by the jury was answered at all, since "the law as to the certification of cheques when no money appeared to the credit of the drawer" involves civil consequences under section 5208, and criminal consequences under section 13, unless it is to be held that every certification where funds are lacking constitutes a wilful violation of section 5208. We cannot accept the view that because when the court asked the jury whether the first part of section 5208 answered their question, the foreman replied in the affirmative, therefore there was no error in the failure to call their attention to section 13. If the court was satisfied that the law applicable to the case was embodied in the first part of section 5208, the jury were bound to be satisfied also; but we are of opinion that that was an insufficient definition, and was therefore erroneous. However the court went further, and said: .

"I charge you, in addition to the instructions I gave you this morning, that a cheque drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the cheque good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the cheque, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certified it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a cheque is good when there are no funds there to meet it.

"You understand what I have said now is to be taken in connection with what I have before instructed you."

We fear that these instructions, following in direct connection with what had passed in reference to section 5208, may have led the jury to understand the law of the case to be that the false certification thus defined constituted a criminal offence under the statute, and that that impression was not rendered harmless by the admonition that what was then said was to be taken with what had been said before.

At all events, we think it would be going too far to hold

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that that caution operated to obviate the error in failing to explain section 13 at this particular juncture. The jury had been considering their verdict for several hours, and had then in effect requested a more complete definition of the offence. This the court assumed to give, but it was incomplete, and what was omitted cannot properly be held to have been supplied, under the circumstances, by the reference to prior instructions. The court had indeed, in the original charge, used the words "wilfully" and "wilful" in the following instructions:

"If you find from the proof that the account of Dobbins and Dazey, upon the books of the bank, was overdrawn continuously during the period covered by the dates of the cheques certified by the defendant and that the defendant was in fact ignorant of such overdraft; and that he certified the several cheques mentioned in the indictment believing at the time that the exchange deposited by Dobbins and Dazey on the days upon which said cheques were certified, was sufficient or more than sufficient to cover the amount of said cheques, besides the overdraft already existing, then he is not guilty and you should acquit him, unless such ignorance of the overdraft was wilful as elsewhere explained in the court's instructions. In this connection, you will bear in mind what I have previously charged you, that if this was a general and not a special account of Dobbins and Dazey, that the exchange which came in was applicable in the first place to the liquidation of the previously existing overdraft before there could be said to be any funds to the account of Dobbins and Dazey to respond to the cheques."

"If the proof fails to satisfy your minds clearly and beyond a reasonable doubt, that the defendant did actually know, at the time he certified the cheques mentioned in the indictment that Dobbins and Dazey did not have on deposit in the bank sufficient funds and credits to meet the cheques so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly and in bad faith—these words mean substantially the same thing—shut his eyes to the fact and purposely refrained

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from inquiry or investigation for the purpose of avoiding knowledge."

The court had also said that "in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins and Dazey justified it, he is not guilty of the offence charged. Mere negligence or carelessness unaccompanied by bad faith would not render him guilty." And other passages of similar purport might be quoted.

But the jury desired further advice as to what constituted criminal certification, or wilful violation of section 5208, and preferred a request which required a comprehensive answer. The response was in the nature of a separate charge, and we are unable to conclude that the error in declining at that time to call attention to section 13 was cured by the bare reference to the original charge.

Many other errors were assigned and pressed in argument, but, as the particular points may not arise in the same way on another trial, we prefer to refrain from expressing any opinion upon them.

The judgment of the Circuit Court of Appeals is reversed ; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with a direction to set aside the verdict and grant a new trial.

MR. JUSTICE BROWN and MR. JUSTICE McKENNA dissented.